

October 2005

MJI Publications Updates

Adoption Proceedings Benchbook

**Child Protective Proceedings
Benchbook (Revised Edition)**

**Criminal Procedure Monograph 1—
Issuance of Complaints & Arrest
Warrants (Revised Edition)**

**Criminal Procedure Monograph 2—
Issuance of Search Warrants (Revised
Edition)**

**Criminal Procedure Monograph 6—
Pretrial Motions (Revised Edition)**

**Juvenile Traffic Benchbook (Revised
Edition)**

Michigan Circuit Court Benchbook

**Traffic Benchbook—Third Edition,
Volume 1**

**Traffic Benchbook—Third Edition,
Volume 3**

October 2005

Update: Adoption Proceedings Benchbook

APPENDIX C

Absent Parent Protocol: Identifying, Locating, and Notifying Noncustodial Parents in Child Protective Proceedings

The State Court Administrative Office has revised the Absent Parent Protocol. Replace the title of Appendix C, as indicated above, and replace the text with the following:



ABSENT PARENT PROTOCOL:

*Identifying,
Locating, and
Notifying
Noncustodial
Parents in
Child Protective
Proceedings*

Absent Parent Protocol

Table of Contents

INTRODUCTION	1
SECTION I: IDENTIFYING A CHILD’S FATHER	3
SECTION II: EARLY ATTENTION TO THE ABSENT PARENT ISSUE	4
A. Involvement of Child Protective Services and Foster Care.....	4
B. Minimum Requirements for Identifying and Locating an Absent Parent	4
C. Sharing Information	7
D. Petitions	8
E. Two Quick Resources for Locating Absent Parents.....	9
F. Checklist for Information Sharing and Communication	10
SECTION III: COURT PROCEEDINGS	11
A. Raising the Issue of Paternity and the Identity and Location of an Absent Parent.....	11
B. Conducting a Serafin Hearing	13
C. Conducting a Putative Father Hearing	13
D. Requiring Amendments to Petition	14
E. Ensuring Service of Process	14
F. Ongoing Attention During the Dispositional Phase of Proceedings	16
G. New Information Discovered During the Dispositional Phase—Supplemental Petitions.....	17
H. Termination of Parental Rights of Absent Parents	17
SECTION IV: RESOURCES	19
THE OFFICE OF CHILD SUPPORT	19
FRIEND OF THE COURT	20
OTHER RESOURCES	21
APPENDICES	22
Appendix 1: Legal Fathers – Identifying a Child’s Father	22
Appendix 2: Conducting a Serafin Hearing (<i>Serafin v Serafin</i> , 401 Mich 629 (1977))	25

ABSENT PARENT PROTOCOL: Identifying, Locating, and Notifying Noncustodial Parents in Child Protective Proceedings

INTRODUCTION

The Absent Parent Protocol was developed as a resource for the people responsible for identifying, locating and, if appropriate, involving absent parents in child protective proceedings. The goal is to address the absent parent issue as early as possible and, as necessary, at each stage of a child protective case to prevent disruption of the permanency plan later in the case.

This protocol was developed in response to problems that arose when absent parents were not involved early in the process.

- Permanency plans were disrupted when an absent parent was not identified or located early on, and that parent sought to participate long after the direction of the case was established.
- Court proceedings were unnecessarily delayed or made more complicated when absent parents were involved at a late point in the case.
- Placement of the child with the absent parent or his/her family was eliminated as a possibility when the absent parent was not identified or located.

These concerns, and others, were raised in several forums identifying the barriers to permanency. The Children's Task Force of the State Bar of Michigan, the Kent County Families for Kids Initiative, and annual reports of the Foster Care Review Board have all raised absent parent issues as a key obstacle to permanency. The issues were also discussed in the assessment phase of the State Court Administrative Office's Court Improvement Project, in which absent parent issues emerged as one of the top three barriers to achieving permanency for children. In response, the State Court Administrative Office began developing a protocol to identify absent parents and include them in the process as early as possible. Most recently, the matter of absent parents was raised in the federal Child and Family Services Review. Michigan's Child and Family Services Review Program Improvement Plan includes this protocol as part of its response in addressing the absent parent issues.

The Absent Parent Protocol is a result of recommendations from an independent assessment of child protective court proceedings. It was developed in response to a broad-based consensus that failure to appropriately handle absent parent matters has been a barrier to a timely permanent placement for too many children. Although the protocol does not carry the weight of law, it does discuss a variety of activities that are statutorily required and mandated by court rule. This protocol should therefore be treated as recommendations for best practices.

Four interrelated themes guided the development of this protocol.

1. **The courts must take leadership to ensure that efforts to locate and involve absent parents begin at the earliest stages of a child protective proceeding.** The role of the court is essential to a successfully implemented local protocol. In addition, activities to locate absent parents can be locally institutionalized by integrating the issue into local procedures.
2. **Protocol elements must be sensitive to current workload and responsibilities.** This protocol is designed to provide approaches that are effective but not burdensome, and serve as a best practices resource.
3. **The protocol must take full advantage of new technologies.** New and enhanced access to databases and other information sources can greatly facilitate the search for absent parents.
4. **The protocol will only be successfully implemented with the “buy in” of local leadership.** The intent of this protocol is to provide useful, efficient tools for locating and involving absent parents. Successful local implementation, however, will require changing local practice in building new relationships and expanding efforts to find absent parents. Ultimately, the local court, the Department of Human Services, and other stakeholders must agree that children involved in child protective proceedings deserve permanency, and that implementing the Absent Parent Protocol is a key way to achieve earlier dispositions and greater permanency.

Section I: IDENTIFYING A CHILD’S FATHER

A. **Legal Father:** In a child protective proceeding, a child’s parents are his or her mother, his or her father, as defined by law, or both. It is important to distinguish between a father who has rights recognized by law and a man claiming to be a father who does not have such rights. A man who has legally-recognized rights is called a “legal father.” To be a legal father, a man must fit into one of the following categories:

1. A man who is married to the child’s mother at any time from the child’s conception to the child’s birth.
2. A man who has legally adopted the child.
3. A man who has been determined to be the child’s legal father in an order of filiation or judgment of paternity as a result of an action under the Paternity Act.
4. A man who has been determined by a judge in a divorce action to have parental rights.
5. A man who has been determined to be a child’s legal father by the proper filing of an acknowledgment of parentage.

Note: See Appendix 1 for a fuller discussion of each of these ways that a man can be legally established as a father.

B. **Putative Father:** A “putative father” is an alleged biological father of a child. A putative father can only exist where a child has no legal father, and has no legal rights unless and until he legally acknowledges paternity of the child. If a legal father exists, a putative father may not be identified or participate in a child protective proceeding unless the presumption of a child’s legitimacy is rebutted (see Appendix 1). If no legal father exists, a court may conduct a “putative father hearing” to identify the alleged father, facilitate notification of the alleged father, and allow him to legally establish his paternity of the child.

If a child’s mother is married at the time of birth, the mother’s husband must be identified as the father on the child’s birth certificate. If a child’s mother is unmarried at the time of birth, a father’s name may not be placed on the child’s birth certificate without the completion and filing of an acknowledgment of parentage or a court order following a paternity action.

Section II: EARLY ATTENTION TO THE ABSENT PARENT ISSUE

A. Involvement of Child Protective Services and Foster Care

The Department of Human Services and private agency staff must begin to identify, locate, and involve an absent parent at the earliest stages of child protective proceedings.

Early efforts to involve an absent parent can ensure the issue is addressed in the petition and can facilitate cooperative and coordinated efforts among staff from Child Protective Services, Department of Human Services foster care, and private agency foster care.

During the early stages of a child protective proceeding, both foster care and Child Protective Services may be involved. Child Protective Services staff is responsible for the legal aspects of the case and stays involved through the adjudication phase. In many jurisdictions, foster care staff will begin to take on the social work role at the preliminary hearing or shortly thereafter. As a result, during the time between the preliminary hearing and the adjudication of the case, both foster care and Child Protective Services staff can be actively seeking an absent parent.

The amount of information that foster care or Child Protective Services staff has regarding absent parents will vary depending upon the case. In many counties, Child Protective Services has placed a high value on providing services and interventions for low- and moderate-risk families. In these cases, because of their prior involvement with the family, Child Protective Services staff is more likely to have information regarding an absent parent. In more egregious cases where a petition is filed immediately, Child Protective Services' involvement is limited to investigation and substantiation.

B. Minimum Requirements for Identifying and Locating an Absent Parent

Child Protective Services, foster care, and private agency workers have specific duties concerning the identification and location of absent parents that vary depending upon the circumstances of the case. However, in all cases the absent parent issue should be addressed from the onset. At a minimum, Child Protective Services should ask the parent with whom they have contact about the identity and whereabouts of the absent parent, and be prepared to discuss the issue at the preliminary hearing. Because the case responsibilities begin to transition from Child Protective Services to foster care after the preliminary hearing but before the adjudication, local Child Protective Services and foster care staffs will need to develop a process to assure continued diligent efforts to find absent parents.

1. Diligent Search

A diligent search will include interviewing the child's custodial parent and other relatives, checking telephone and other directories, and initiating a search through the local friend of the court or the Department of Human Services' Office of Child Support. (See Section IV: Resources for Office of Child Support Information.) If the efforts fail to reveal an absent parent's identity or location, an *Affidavit of Efforts to Locate Absent Parent* (JC 83) should be completed prior to the time when notice is required for an upcoming trial. This affidavit outlines the efforts made to identify and locate the absent parent, and is submitted to the court along with a *Motion for Alternate Service of Process* (JC 46) on the absent parent.

The Department of Human Services' policy requires a foster care worker to:

- determine whether the mother was married at the time of conception or birth by talking with the mother and relatives,
- determine whether the parents are divorced and, if so, whether either parent is paying child support,
- review the child's birth certificate to see if a father is listed,
- contact the friend of the court or the Central Functions Unit within the Office of Child Support to determine whether anyone has been paying child support,
- contact the family division of the circuit court to determine whether an order of filiation has been entered, and
- contact the probate court to determine whether an affidavit of parentage has been filed.¹

Other ways to locate an absent parent include: conducting a statewide Client Information System inquiry and a Secretary of State inquiry, searching telephone books and U.S. Post Office addresses, conducting a friend of the court inquiry, checking with the county clerk's office for vital statistics, contacting the absent parent's last place of employment, following up on leads provided by friends and relatives, and seeking legal publication. A

¹ Acknowledgements of parentage are required to be filed with the state registrar. Subsequent proceedings on the acknowledgement are proper in the circuit court.

foster care worker may use the Federal Parent Locator Service if he or she knows the absent parent's social security number; the Department of Human Service's "Free Parent Locator Services" at http://www.michigan.gov/fia/0,1607,7-124-5453_5528_6741---,00.html; and the Michigan Department of Corrections "Offender Tracking Information System" at <http://www.michigan.gov/corrections/0,1607,7-119-1409---,00.html>.

2. Paternity Testing

Child Protective Services and foster care staff have access to free paternity testing as follows:

a. Paternity Testing Through the Office of Child Support

The Office of Child Support will provide paternity testing services if foster care staff makes a referral to the Office of Child Support for the purpose of establishing paternity and/or a support order. The court may order the foster care worker to make a referral to the Office of Child Support. There are two advantages to requesting paternity testing through the Office of Child Support:

- ninety percent (90%) of the cost for testing is paid through federal reimbursement with the remaining 10% paid through county funds, and
- more than one test can be requested.

To access paternity testing a referral is made to the Office of Child Support using Form DHS-3205. Paternity testing will be available for cases in which the mother/father status code is either 05 or 06 on the Medicaid case.

Note: These services are not available in cases where the court orders paternity testing without an Office of Child Support referral. There must be a Title IV-D case to access federal funding for testing.

b. Paternity Testing Through the Department of Human Services Contract Services

An agreement has been established for paternity genetic testing services through Orchid Cellmark, with all costs paid by the Department of Human Services Central Office. To arrange an appointment for parentage testing/specimen collection, workers should contact Orchid Cellmark directly by phone (800-443-2383) or FAX (937-294-3385). Key factors to remember:

- the service is not to establish child support,
- the service is available one time per client,
- workers requesting this service must ensure that previous test results are not available through other sources such as the Office of Child Support or the friend of the court, and
- pictured identification and social security numbers for parents and children are required at the time of the appointment.

For more information, refer to the Department of Human Services L-letter 99-084 (or subsequent L-letters on the topic).

Note: Private agency foster care workers should consult with their Department of Human Services contract manager for guidance on how to access this service.

C. Sharing Information

If Child Protective Services staff has been unable to identify the absent parent prior to filing the petition, any relevant information should be provided to the assigned foster care worker, including:

- Any efforts to locate the absent parent that are pending at the time of the transfer.
- Any efforts that may benefit from continued attention. For instance, since Child Protective Services has likely been involved in removing the child from the home, the relationship with the custodial parent may not be conducive to sharing information. A foster care worker may be able to create a more positive relationship and elicit more useful information.

Because of the different people potentially involved in efforts to locate absent parents, it is vital that information be shared in a timely manner. This includes good communication between Child Protective Services and foster care staff. Protocols must be established between the Department of Human Services and private agencies to ensure that foster care staff have access to the resources available for finding absent parents and for establishing paternity.

Note: Private agency foster care staff will need to access the services of the Office of Child Support through their contract monitor with the Department Of Human Services.

D. Petitions

A petition must identify both legal parents or identify a father as a putative father. **Failure to ensure that a parent is named as a respondent when it is appropriate to do so is a frequent reason for permanency delays.**

If a legal father exists, only the legal father may be named as a respondent in a petition requesting termination of parental rights. If a father's identity is unknown, it should be stated in the petition. In most cases, if the absent legal parent is not involved in the child's life, has not sought custody of the child, and there is no indication that the absent parent intends to provide for the proper care and custody of the child, the court may assume jurisdiction and the absent parent's parental rights may be terminated for desertion or failure to provide proper care or custody.

If appropriate, allegations of desertion or child neglect by an identified father should be included in the original or an amended petition. The allegations against the absent parent do not have to be the same as those that brought the parent with custody to the attention of the court.

Including the absent parent as a respondent in the original petition, if appropriate, or amending the petition to include the absent parent when allegations surface later, can:

Preserve the Absent Parent's Right to a Jury Trial. A party to a child protective proceeding may demand that a jury decide whether the facts alleged in the petition bring the child within the court's jurisdiction. The demand for a jury trial must be filed no later than 21 days before trial, unless the court excuses a later filing in the interests of justice. However, once jurisdiction over a child has been established through one parent's plea or at a trial of allegations against one parent, another parent has no right to demand a jury trial of allegations against him or her. Therefore, an absent parent's right to a jury trial depends on being identified and notified prior to adjudication.

Resolve Evidentiary Issues: Legally admissible evidence is not required where parental rights are terminated in a typical child protective proceeding and termination is sought under a supplemental petition after the parent or parents have had an opportunity to improve their parenting ability. However, if an absent parent is not named as a respondent before termination of parental rights is requested, and the allegations against the absent parent are new or different from those allowing the court to take jurisdiction, then legally admissible evidence must be used to establish a legal basis for termination of parental rights for the absent parent. While the absent

parent is rightfully entitled to such protection, the stricter evidentiary standards could preclude the admission of relevant information concerning the absent parent that would have been admissible if the absent parent had been named as a respondent in the action prior to adjudication.

Ensure the Absent Parent's Early Involvement in the Case Service Plan. Absent parents who may have an interest in creating a parental relationship with the child are much more likely to respond to legal notice of the proceedings and become involved in the case service plan early on. Therefore, it is important to include an absent parent as a respondent, if appropriate. In too many cases, absent parents seeking to assert their parental rights have emerged only after it has become apparent that the custodial parent will likely lose parental rights, which delays permanency for the child.

When amending a petition, Child Protective Services, foster care, and private agency staff must cooperate and share information regarding allegations against an absent parent.

E. Two Quick Resources for Locating Absent Parents

Federal Parent Locator Service (FPLS)

- FPLS is a good resource for an initial search and is available to foster care staff
- Having the social security number is extremely helpful when making the request
- FPLS requests can be made without opening a case for support
- To request FPLS, send an e-mail to FIA-OCS-CFU-Staff1@michigan.gov (include "Locate" in the subject line or, for urgent requests, "Locate-Urgent") or call 866-281-0031

Paternity and Payment Inquiries

The Office of Child Support can confirm whether paternity has been established for children involved in Child Protective Services investigations. The Central Functions Unit of the Office of Child Support will provide:

- paternity information,
- the last known address of the noncustodial parent,
- payment information on the court order, if one exists, and
- the progress of the Office of Child Support's efforts to locate and/or establish paternity.

Contact the Central Functions Unit at 866-281-0031

F. Checklist for Information Sharing and Communication

Petitions

- ☐ Is there a local process for exchanging information between foster care and Child Protective Services staff to:
 - ☐ Ensure the transition of responsibilities as a case moves from Child Protective Services to foster care?
 - ☐ Amend an original petition?
- ☐ Is there a lead person at Child Protective Services for this purpose?
- ☐ Do private agency staffs work through a Department of Human Services monitoring worker at the local Department of Human Services office, or can they contact Child Protective Services directly?
- ☐ Does the prosecutor's office (or other agency providing legal representation) assist in filing amended petitions?

Services

- ☐ Do private agency staff know key contacts at the local Department of Human Services to access services such as paternity testing and parent locating through the Office of Child Support?
- ☐ Has an appropriate protocol been established with the Office of Child Support so that:
 - ☐ The Department of Human Services and contract agency staff know who to contact to request a search?
 - ☐ Both the Department of Human Services and contract agency staff know that the Office of Child Support's progress can be tracked by calling the Central Functions Unit at (866) 281-0031?
 - ☐ The Department of Human Services and contract agency staff notify the Office of Child Support if a parent has been identified or located independently of the requested search?
- ☐ Do all parties involved in search efforts have an agreed upon local protocol for communicating results to the court, including, if appropriate, the filing of an amended petition?

Section III: COURT PROCEEDINGS

The court's leadership can significantly influence the effort to locate absent parents. A successful protocol for identifying, locating, and involving absent parents depends on a local system that requires attention to the issue at the earliest point and at every subsequent proceeding. Although locating absent parents is primarily the responsibility of non-court staff, the court lends credence to this effort by ensuring, as part of court review, that absent parents are aggressively pursued.

A. Raising the Issue of Paternity and the Identity and Location of an Absent Parent

1. Questioning the Custodial Parent

If a child's absent parent has not been identified, the referee or judge who conducts a preliminary hearing must inquire of the child's custodial parent or anyone else present who has information regarding the identity and whereabouts of the child's absent parent. The court may place the parent who is present under oath and take testimony as to the identity and whereabouts of the absent parent. This approach can be useful when the court suspects that the parent who is present knows more about the absent parent's identity and location than he or she has been willing to admit. In these situations, Child Protective Services or foster care staff should be prepared to explain to the court why such testimony might be warranted.

2. Questioning the Petitioner

It is an essential role for the presiding jurist to raise the absent parent issue at every child protective proceeding until the absent parent's identity or location is established. The court may ask the Child Protective Services or foster care worker the following questions, as appropriate:

- Did you ask the available parent about the identity and whereabouts of the absent parent?
- Have you contacted friends and relatives of both the available and the absent parent?
- Did you check the telephone directory?

- Have you compiled complete information on the absent parent, such as:
 - Name?
 - Last-known address?
 - Phone numbers?
- Did you check the city directory? (if one exists)
- If none of the above was successful, have you explored other sources, such as:
 - Referral to the Office of Child Support to establish child support?
 - Contact with the local friend of the court or the Office of Child Support's Central Functions Unit to determine whether a support order exists?
- Did you look for other legal documents?
 - Is a father listed on the birth certificate?
 - Is an acknowledgment of parentage on file in the circuit court or with the State of Michigan?
 - Is an order of filiation or judgment of paternity on file with the circuit court?
 - If paternity has been established, was it verified by the Office of Child Support? *Note: The Office of Child Support is paperless; the support specialist workers have access to the Central Paternity Registry, but do not have access to certified copies.*
- If the child has no legal father, is a putative father hearing appropriate?
- If parentage is in question, is paternity testing in process or complete?
- If the absent/noncustodial parent has been identified, but not located, have you collected the following information and, if appropriate, included it in the petition?
 - Does the absent parent have a criminal history?
 - Does the absent parent have a Child Protective Services history?
 - Has the absent parent ever contributed to the financial support of the child(ren)?
 - Has the absent parent ever had custody of the child(ren)?
 - Have any of the absent parent's relatives ever been involved in caring for the child(ren)?
 - To what extent has the absent parent maintained contact with the child(ren) or otherwise shown interest?
 - Are there other factors that would indicate the absent parent's willingness and/or ability to care for the children?

B. Conducting a Serafin Hearing

If a child's mother was married at any time from conception to birth of a child involved in the proceedings, and if the mother or legal father alleges that the legal father is not the biological father of the child, the court must conduct a hearing to determine whether the presumption of the child's legitimacy has been rebutted by clear and convincing evidence. (This hearing is commonly called a "Serafin hearing" from the Michigan Supreme Court case that established the requirement. (*Serafin v Serafin*, 401 Mich 629 (1977)).

Note: See Appendix 2 for more information concerning when and under what circumstances a Serafin hearing is conducted.

C. Conducting a Putative Father Hearing

If a child has no legal father, and if the court has reason to believe that an identified person is the child's biological father, the court may take testimony to attempt to establish the identity and address of the child's alleged biological father. If the court finds probable cause to believe that an identifiable person is the child's biological father, the court must direct that notice be served on that person that a hearing is scheduled to determine his interest, if any, in the child.

The court must direct that notice be served on a putative father in any manner reasonably calculated to provide notice, including publication if his whereabouts remain unknown after diligent inquiry. However, a published notice must not contain the putative father's name. Notice by publication must be provided if the putative father's identity is unknown. The court rule also requires that the notice to the putative father contain the following information:

- If known, the name of the child, the name of the child's mother, and the date and place of birth of the child,
- That a petition was filed with the court,
- The time and place of hearing at which the natural father is to appear to express his interest, if any, in the minor, and
- A statement that failure to attend the hearing will constitute a denial of interest in the minor, a waiver of notice for all subsequent hearings, a waiver of a right to appointment of an attorney, and possible termination of any parental rights.

After directing notice to an identified or unidentified putative father, the court may make one of several findings. First, the court may determine that a putative father has been served in a

manner reasonably calculated to provide notice. The court may also determine by a preponderance of the evidence that the putative father is the child's biological father and allow him 14 days (or more for good cause shown) to establish legal paternity according to the definitions set forth in Section I, above. Alternatively, the court may find probable cause to believe that another identified man is the child's biological father and direct that notice be provided to that person as stated above. If an identified putative father fails to appear after proper notice or appears but fails to timely establish paternity, the court may find that he waives all rights to further notice, including the right to notice of termination of parental rights, and the right to an attorney. Finally, the court may determine that a diligent inquiry has been conducted and the identity of the child's biological father cannot be determined. If the court makes this finding, it may proceed without further notice and without appointing an attorney for the unidentified person.

Until a child's putative father has legally established his paternity of the child, a putative father is not entitled to receive notice of or participate in child protective proceedings, or to court-appointed counsel.

D. Requiring Amendments to Petition

The court should require counsel for the petitioner to add allegations against an absent parent by amended petition. While this protocol emphasizes inclusion of an absent parent as a respondent in an original petition, in some cases foster care or Child Protective Services staff will discover information about an absent parent that needs to be added in the form of an amended petition. When such amendments are made, the absent parent must be served with an amended petition and summons. If personal service cannot be achieved, service may be made by registered mail or publication, with the court's approval. The absent parent is then a respondent to the proceedings and under the jurisdiction of the court.

E. Ensuring Service of Process

1. Serving the Respondent

Ensure that a summons is personally served on a respondent for an adjudicative hearing and, if held, a hearing on termination of parental rights. If the respondent is an absent parent, include:

- Summons: Order to Appear (Child Protective Proceedings) (JC 21)
- Petition (JC 04)
- Notice of Hearing (JC 45)

2. Serving the Noncustodial Legal Parent

Notice for a noncustodial legal parent who is not a respondent is provided by personal service of the *Notice of Hearing* (JC 45) and a copy of the petition. If personal service cannot be achieved, the court may order service of process be made by mail or publication. In addition, the court may issue a summons requiring the appearance of anyone whose presence is found by the judge to be necessary. Therefore, in some cases a nonrespondent parent may receive a summons as well.

A summons to appear at a child protective proceeding clarifies the purpose of the proceeding, the party's rights, and the consequences for failure to appear.

In addition to the court providing the summons, the foster care worker should communicate to both the custodial and the noncustodial parents the importance of staying involved in court proceedings and complying with the case service plan.

3. If a Respondent or Noncustodial Legal Parent is Incarcerated

If a respondent or noncustodial legal parent is incarcerated under the jurisdiction of the Department of Corrections, the petitioner must also comply with MCR 2.004. The petitioner must:

- contact the Department of Corrections to confirm the incarceration and the incarcerated party's prison number and location,
- serve the incarcerated person with the petition or motion seeking an order regarding the minor child, and file proof with the court that the papers were served, and
- file with the court the petition or motion seeking an order regarding the minor child stating that a party is incarcerated and providing the party's prison number and location. The caption of the petition or motion shall state that a telephonic hearing is required by this rule.

The court must then issue an order requesting that the Department of Corrections, or a non-Department of Corrections facility where the respondent or parent is located, allow

the respondent or parent to participate in a hearing or conference via a non-collect and unmonitored telephone call. The court must serve the order on the parties and the warden or supervisor of the facility where the respondent or parent resides.

4. If Personal Service is Impracticable or Cannot be Achieved

If a summons cannot be personally served on a respondent, the court may order alternate service in any manner reasonably calculated to provide actual notice. To do so, the court must find on the basis of testimony, a motion and affidavit, or any other information that personal service is impracticable and cannot be achieved. Use SCAO-approved *Motion for Alternate Service* (JC 46) and *Order for Alternate Service* (JC 47) for this purpose

Diligent efforts to locate and personally serve an absent legal parent are required before asking the court to approve a motion for alternate service. A caseworker should use an *Affidavit of Efforts to Locate Absent Parent* (JC 83) when filing a motion for alternate service to demonstrate that diligent efforts were made to locate the absent parent. On the form, the caseworker will affirmatively state that diligent efforts have been made to locate an absent parent. In addition, it establishes a request for a search by the Office of Child Support as a “diligent efforts” standard when other activities prove unsuccessful.

5. Alternate Service

If a parent’s whereabouts are known but personal service cannot be achieved, service may be made in “any manner reasonably calculated to give notice of the proceeding and an opportunity to be heard,” including registered or certified mail addressed to the last known address. If a parent’s whereabouts are unknown, the court may order service by publication. However, a court should not order service by publication or any other substituted service if the petitioner has not made reasonable efforts to locate the absent legal parent. A motion for alternate service must show that the substituted method of service is best suited to provide actual notice of the proceedings to the absent parent.

F. Ongoing Attention During the Dispositional Phase of Proceedings

This protocol is designed to promote early, intensive, and coordinated efforts for finding and, if appropriate, involving an absent parent in a child protective proceeding. In most cases these efforts will resolve the issue early in the process. However, in some situations, absent parent issues may linger beyond the adjudicatory phase of a child protective proceeding. In these cases, the judge or referee should raise the issue of an absent parent at each court proceeding after

adjudication so long as questions remain. Depending upon the circumstances, any of the following may be appropriate review questions.

- ***Identity and whereabouts are not known***

What continued efforts have been made to identify and locate the absent parent?

- ***Identity is known but efforts to locate have not been successful***

What continued efforts have been made to locate the absent parent?

- ***Identity is believed to be known, but parentage is being denied or is in question***

What steps have been taken to determine parentage?

- ***Parentage has been determined since the last court hearing***

What has been done to engage the absent parent involved in the child's life, or to establish that the parent has no interest?

G. New Information Discovered During the Dispositional Phase—Supplemental Petitions

If the agency responsible for a child's care and supervision becomes aware of additional abuse or neglect of a child who is under the jurisdiction of the court, and if that abuse or neglect is substantiated, the agency is required to file a supplemental petition with the court. If the supplemental petition does not request termination of parental rights, the court may address the petition at a review hearing or progress review. If the supplemental petition requests termination of parental rights, the court must conduct a hearing under MCR 3.977. In either case, the court is not required to redetermine its jurisdiction over a child, and a respondent to the new allegations in the supplemental petition is not entitled to a jury trial on those allegations. However, a respondent to the supplemental petition must be notified of a review hearing at which the new allegations will be addressed or, if termination of parental rights is requested, must be personally served with a summons and a copy of the supplemental petition.

H. Termination of Parental Rights of Absent Parents

If termination of parental rights is requested, only a child's legal father may be identified in the petition. If no legal father exists and proper notice has been provided to a putative father, the court may terminate any parental rights that putative father may possess. If a child has no legal

father, and a putative father has or had an established custodial or support relationship with the child but has failed to legally establish his paternity for that child, the court may terminate any parental rights that putative father may have pursuant to the Juvenile Code. If neither a legal father nor a putative father has been identified, the court may include in its order a provision that terminates the rights of the child's mother and sole legal parent, and the rights of the child's biological father, including any rights the unidentified father may have.

At least one statutory ground for termination of the absent legal parent's parental rights must be properly alleged and set forth in the supplemental petition (e.g. abandonment, failure to provide proper care of custody).

A respondent-parent must be personally served with a summons and a copy of a petition requesting termination of that parent's rights. If personal service is impracticable or cannot be achieved, an alternate method of service may be used.

If the court has entered a dispositional order placing a child in the temporary custody of the court, the court may not proceed to a hearing on termination of parental rights without issuing a new summons and ensuring proper service of that summons. A respondent-parent must be personally served with a summons and a copy of a petition requesting termination of parental rights. The rules governing service in child protective proceedings include provisions for substituted service, including service by registered mail or publication, when personal service is impracticable or the parent's whereabouts are unknown. Before resorting to notice by publication, however, the court must determine whether reasonable efforts were made to locate the absent parent. MCR 3.920.

Section IV: RESOURCES

THE OFFICE OF CHILD SUPPORT

The Office of Child Support (OCS) has access to a variety of resources that can be extremely helpful in efforts to locate an absent parent and is willing to work with Department of Human Services staff to assist in locating absent parents.

Federal Parent Locator Service (FPLS)

- FPLS is a good resource for an initial search and is available to foster care staff
- Having the social security number is extremely helpful when making the request
- FPLS requests can be made without opening a case for support
- To request FPLS, send an email to FIA-OCS-CFU-Staff1@michigan.gov (include "Locate" in the subject line or, for urgent requests, "Locate-Urgent") or call (866) 281-0031.

Paternity and Payment Inquiries

The Office of Child Support will determine whether paternity has been established for children involved in Child Protective Services investigations.

The Central Functions Unit of the Office of Child Support will provide the following:

- Paternity information
- Last known address of the noncustodial parent
- Payment information on a court order, if one exists

Contact the Central Functions Unit by calling (866) 281-0031.

Requesting Assistance

The following available information should be provided when requesting assistance of the Office of Child Support. Make sure that information (dates, spellings, etc.) is accurate.

- | | |
|--|------------------------------------|
| • Social security number | • Date of birth |
| • Driver's license number | • Last place of employment |
| • Last known address | • Hometown |
| • Prior or subsequent marriages/children | • Miscellaneous family information |
| • Spelling of party's names | • Mother's maiden name |

You can find out the progress of efforts to locate and/or establish paternity and child support by calling the Central Functions Unit at 866-281-0031.

Office of Child Support Assistance Eligibility

A threshold requirement for assistance from the Office of Child Support is that the child must be eligible for any of the following programs.

- Family Independence Program (FIP)
- Title IV-E (foster care maintenance payments)
- Child Development Care (CDC)
- Food Assistance Program (FAP)
- Medicaid

There are two ways the Office of Child Support Services can provide help for children in substitute care:

- **Public Assistance Eligibility.** Any child who is currently eligible or is a former recipient of FIP or Medicaid (this includes county and state funded foster care placements) is eligible for Office of Child Support assistance. Also, if IV-E maintenance payments are being made, the child is also IV-D eligible and services can be requested from the Office of Child Support. An automated referral is made via the Customer Information System (CIMS) to the Michigan Child Support Enforcement System (MiCSES) by coding the mother/father status codes correctly on the child's Medicaid case.
- A request for IV-D services can be made by a relative caregiver who is not receiving a foster care payment or FIP and/or Medicaid. Relative caregivers in this category request services by completing a Form DHS-1201: *Non-FIP Child Support Services Application* and submitting it to the Office of Child Support at the following address:

Office of Child Support
Attn: Central Functions Unit
235 S. Grand Avenue
Lansing, MI 48909

FRIEND OF THE COURT

The local friend of the court may assist in locating an absent parent. The friend of the court has access to the Michigan Child Support Enforcement System database and can access information for all 83 counties in Michigan.

Access to the friend of the court will require agreements at the local level to establish a protocol for sharing information. In communities where agreements are reached, the friend of the court will need as much of the following information as possible:

- Full name of the absent parent (including any alias)
 - Date of birth
 - Social security number
 - Last known address, employer, and phone number
 - Marital status
- Full name of custodial parent
 - Date of birth
 - Social security number
- Full names of children, including date of birth and social security numbers

OTHER RESOURCES

Other Office of Child Support parent locating resources include:

- Department of Consumer and Industry Services
- Department of Natural Resources (hunting and fishing license)
- Department of Defense (military enrollment)
- Department of Corrections (offender tracking system)
- Secretary of State
- U.S. Postal Service
- New hire database
- Quarterly wage data

APPENDICES

Appendix 1: Legal Fathers – Identifying a Child’s Father

Section I of this protocol emphasizes the need to identify whether there is a legal father before determining if there is a putative father. This appendix provides more detailed information on the five ways identified in Section I that a man may be established as a legal father. A man may be found to be a legal father if he:

1. ***Is married to the child’s mother at any time from the child’s conception to the child’s birth.*** If the child’s mother is married at any time from the child’s conception to birth, the man to whom she is married is presumed to be the child’s legal father. Note that a child’s presumed legal father is not necessarily the child’s biological father. For example, if an unmarried woman conceives a child with a man then marries another man prior to the child’s birth, the woman’s husband is the child’s presumed legal father, not the man with whom she conceived the child.

If a legal father exists, a putative father (an alleged biological father) is not identified nor allowed to participate in a child protective proceeding. Only the child’s mother or legal father may attempt to rebut this presumption of the child’s legitimacy. If the presumption is rebutted, the court in a child protective proceeding may find that the child was “not an issue of the marriage,” but the court may not make a legal determination that the putative father is the child’s legal father. Instead, the child’s putative father must establish legal paternity under the Paternity Act² or, if the child’s mother consents, under the Acknowledgment of Parentage Act.

2. ***Has legally adopted the child.***
3. ***Has been determined to be the child’s legal father in an order of filiation or judgment of paternity as a result of an action under the Paternity Act.*** Actions under the Paternity Act are only available when a child is born out of wedlock, i.e. when the child’s mother is unmarried during the entire gestation period or the mother gets married during that period, but a court has previously determined that the child is not a product of the marriage.

² If the foster care worker makes a referral to the Child Support Unit and the prosecuting attorney files an action under the paternity act, the prosecuting attorney’s office is reimbursed for this activity under the IV-D contract.

4. ***Has been determined by a judge in a divorce action to have parental rights.*** In a divorce action, there are two situations where a judge may determine that a husband who is not a child's biological father has parental rights. First, a judge may determine that a man is an "equitable father" if:

- he is married to the child's mother, but is not the biological parent of a child born or conceived during the marriage,
- he and the child mutually acknowledge a relationship as father and child, or the child's mother has cooperated in the development of a father-child relationship over a period of time prior to filing for divorce,
- he desires to have the rights afforded to a parent, and
- he is willing to take on the responsibility of paying child support.

Second, a judge may determine that a man should be estopped (prevented) from denying he is a child's legal father if the man is married to the child's mother, is not the child's biological father, does not want the rights afforded to a parent, and refuses to pay child support. A judge may assign such a man parental rights if it would be unfair not to do so. For example, a judge may assign the man parental rights if he married the child's mother while she was pregnant knowing that he was not the child's biological father, or if the man dissuaded the child's mother from placing the child for adoption and agreed to raise the child as his own.

For a man to be determined to have parental rights in a divorce action, the man and the child's mother must be married to one another. The circumstances outlined in this section do not apply to unmarried people.

5. ***Has been determined to be a child's legal father by the proper filing of an acknowledgment of parentage.*** A child's mother and biological father must both sign the acknowledgment of parentage, which must then be filed with the state registrar. As under the Paternity Act, actions under the Acknowledgment of Parentage Act are only available when a child is born out of wedlock, i.e. when the child's mother is unmarried during the entire gestation period or the mother gets married during that period, but a court has previously determined that the child is not a product of the marriage.

If there is no legal father, the court may identify a putative father. A putative father is an alleged biological father of a child who has no legal father as defined above. If a legal father exists, a putative father may not be identified or participate in a child protective

proceeding unless the presumption of a child's legitimacy is rebutted as explained under Section (1) of this Appendix. If no legal father exists, a court may conduct a putative father hearing to identify the alleged father, facilitate notification of the alleged father, and allow him to legally establish his paternity of the child.

If a child's mother is married at the time of birth, the mother's husband must be identified as the father on the child's birth certificate. If a child's mother is unmarried at the time of birth, a father's name may not be placed on the child's birth certificate without the completion and filing of an acknowledgment of parentage or a court order following a paternity action.

Appendix 2: Conducting a Serafin Hearing (*Serafin v Serafin*, 401 Mich 629 (1977))

In Section III (Court Proceedings), the right of legal parents to petition the court for a Serafin hearing is discussed. (The name of this hearing is derived from the Michigan Supreme Court case that established the ability of a legal parent to rebut the presumption of a child's legitimacy, Serafin v Serafin, 401 Mich 629 (1977)). This appendix explains more fully the circumstances under which a legal father may seek a court determination as to whether he is, in fact, the biological parent when there is an existing legal presumption of his parentage.

If a child's mother is married at any time from the child's conception to birth, the mother's husband is presumed to be the child's legal father. This presumption of legitimacy applies in child protective proceedings. When a child is conceived or born during a marriage, a strong, though rebuttable, presumption of legitimacy arises, but the husband or wife may testify regarding nonaccess to one another. This presumption of legitimacy must be rebutted by clear and convincing evidence.

If both legal parents assert the presumption of legitimacy, third parties (i.e., a putative father) may not attack it. If both legal parents attack the presumption, it may be rebutted through their testimony alone. A legal father may contest paternity with the results of a paternity test. Test results that preclude the possibility that a man is a child's biological father are conclusive and sufficient to rebut the presumption of legitimacy. Similarly, a child's mother may contest the legal father's paternity by requesting that a court order the legal father to submit to testing. A mother's testimony that she is uncertain whether the legal father is the biological father has been held insufficient to rebut the presumption of legitimacy.

Where a legal father exists, a putative father may not be identified or participate in child protective proceedings. However, if the mother and legal father rebut the presumption of legitimacy during the child protective proceeding, a court may make a finding that a child is not the issue of a marriage. The court may not, however, determine a child's paternity within the child protective proceeding. Instead, a putative father may be allowed an opportunity to establish his paternity in a separate proceeding, as provided in Section III of this protocol. The court's finding that the child is not an issue of the marriage qualifies as a prior court finding, allowing the putative father to proceed under the Paternity Act. If the putative father properly establishes his paternity, he then has standing to participate in the child protective proceeding.

A putative father does not have standing to intervene in a child protective proceeding following termination of the legal father's parental rights. Termination of the mother's and legal father's parental rights is not a determination that the child was not the issue of the marriage.

October 2005

Update: Child Protective Proceedings Benchbook (Revised Edition)

CHAPTER 5

Notice & Time Requirements

The State Court Administrative Office has revised the Absent Parent Protocol. After Section 5.13, which ends on page 164, replace the Absent Parent Protocol with the following revised edition:



ABSENT PARENT PROTOCOL:

*Identifying,
Locating, and
Notifying
Noncustodial
Parents in
Child Protective
Proceedings*

Absent Parent Protocol

Table of Contents

INTRODUCTION	1
SECTION I: IDENTIFYING A CHILD’S FATHER	3
SECTION II: EARLY ATTENTION TO THE ABSENT PARENT ISSUE	4
A. Involvement of Child Protective Services and Foster Care.....	4
B. Minimum Requirements for Identifying and Locating an Absent Parent	4
C. Sharing Information	7
D. Petitions	8
E. Two Quick Resources for Locating Absent Parents.....	9
F. Checklist for Information Sharing and Communication	10
SECTION III: COURT PROCEEDINGS	11
A. Raising the Issue of Paternity and the Identity and Location of an Absent Parent.....	11
B. Conducting a Serafin Hearing	13
C. Conducting a Putative Father Hearing	13
D. Requiring Amendments to Petition	14
E. Ensuring Service of Process	14
F. Ongoing Attention During the Dispositional Phase of Proceedings	16
G. New Information Discovered During the Dispositional Phase—Supplemental Petitions.....	17
H. Termination of Parental Rights of Absent Parents	17
SECTION IV: RESOURCES	19
THE OFFICE OF CHILD SUPPORT	19
FRIEND OF THE COURT	20
OTHER RESOURCES	21
APPENDICES	22
Appendix 1: Legal Fathers – Identifying a Child’s Father	22
Appendix 2: Conducting a Serafin Hearing (<i>Serafin v Serafin</i> , 401 Mich 629 (1977))	25

ABSENT PARENT PROTOCOL: Identifying, Locating, and Notifying Noncustodial Parents in Child Protective Proceedings

INTRODUCTION

The Absent Parent Protocol was developed as a resource for the people responsible for identifying, locating and, if appropriate, involving absent parents in child protective proceedings. The goal is to address the absent parent issue as early as possible and, as necessary, at each stage of a child protective case to prevent disruption of the permanency plan later in the case.

This protocol was developed in response to problems that arose when absent parents were not involved early in the process.

- Permanency plans were disrupted when an absent parent was not identified or located early on, and that parent sought to participate long after the direction of the case was established.
- Court proceedings were unnecessarily delayed or made more complicated when absent parents were involved at a late point in the case.
- Placement of the child with the absent parent or his/her family was eliminated as a possibility when the absent parent was not identified or located.

These concerns, and others, were raised in several forums identifying the barriers to permanency. The Children's Task Force of the State Bar of Michigan, the Kent County Families for Kids Initiative, and annual reports of the Foster Care Review Board have all raised absent parent issues as a key obstacle to permanency. The issues were also discussed in the assessment phase of the State Court Administrative Office's Court Improvement Project, in which absent parent issues emerged as one of the top three barriers to achieving permanency for children. In response, the State Court Administrative Office began developing a protocol to identify absent parents and include them in the process as early as possible. Most recently, the matter of absent parents was raised in the federal Child and Family Services Review. Michigan's Child and Family Services Review Program Improvement Plan includes this protocol as part of its response in addressing the absent parent issues.

The Absent Parent Protocol is a result of recommendations from an independent assessment of child protective court proceedings. It was developed in response to a broad-based consensus that failure to appropriately handle absent parent matters has been a barrier to a timely permanent placement for too many children. Although the protocol does not carry the weight of law, it does discuss a variety of activities that are statutorily required and mandated by court rule. This protocol should therefore be treated as recommendations for best practices.

Four interrelated themes guided the development of this protocol.

1. **The courts must take leadership to ensure that efforts to locate and involve absent parents begin at the earliest stages of a child protective proceeding.** The role of the court is essential to a successfully implemented local protocol. In addition, activities to locate absent parents can be locally institutionalized by integrating the issue into local procedures.
2. **Protocol elements must be sensitive to current workload and responsibilities.** This protocol is designed to provide approaches that are effective but not burdensome, and serve as a best practices resource.
3. **The protocol must take full advantage of new technologies.** New and enhanced access to databases and other information sources can greatly facilitate the search for absent parents.
4. **The protocol will only be successfully implemented with the “buy in” of local leadership.** The intent of this protocol is to provide useful, efficient tools for locating and involving absent parents. Successful local implementation, however, will require changing local practice in building new relationships and expanding efforts to find absent parents. Ultimately, the local court, the Department of Human Services, and other stakeholders must agree that children involved in child protective proceedings deserve permanency, and that implementing the Absent Parent Protocol is a key way to achieve earlier dispositions and greater permanency.

Section I: IDENTIFYING A CHILD’S FATHER

A. **Legal Father:** In a child protective proceeding, a child’s parents are his or her mother, his or her father, as defined by law, or both. It is important to distinguish between a father who has rights recognized by law and a man claiming to be a father who does not have such rights. A man who has legally-recognized rights is called a “legal father.” To be a legal father, a man must fit into one of the following categories:

1. A man who is married to the child’s mother at any time from the child’s conception to the child’s birth.
2. A man who has legally adopted the child.
3. A man who has been determined to be the child’s legal father in an order of filiation or judgment of paternity as a result of an action under the Paternity Act.
4. A man who has been determined by a judge in a divorce action to have parental rights.
5. A man who has been determined to be a child’s legal father by the proper filing of an acknowledgment of parentage.

Note: See Appendix 1 for a fuller discussion of each of these ways that a man can be legally established as a father.

B. **Putative Father:** A “putative father” is an alleged biological father of a child. A putative father can only exist where a child has no legal father, and has no legal rights unless and until he legally acknowledges paternity of the child. If a legal father exists, a putative father may not be identified or participate in a child protective proceeding unless the presumption of a child’s legitimacy is rebutted (see Appendix 1). If no legal father exists, a court may conduct a “putative father hearing” to identify the alleged father, facilitate notification of the alleged father, and allow him to legally establish his paternity of the child.

If a child’s mother is married at the time of birth, the mother’s husband must be identified as the father on the child’s birth certificate. If a child’s mother is unmarried at the time of birth, a father’s name may not be placed on the child’s birth certificate without the completion and filing of an acknowledgment of parentage or a court order following a paternity action.

Section II: EARLY ATTENTION TO THE ABSENT PARENT ISSUE

A. Involvement of Child Protective Services and Foster Care

The Department of Human Services and private agency staff must begin to identify, locate, and involve an absent parent at the earliest stages of child protective proceedings.

Early efforts to involve an absent parent can ensure the issue is addressed in the petition and can facilitate cooperative and coordinated efforts among staff from Child Protective Services, Department of Human Services foster care, and private agency foster care.

During the early stages of a child protective proceeding, both foster care and Child Protective Services may be involved. Child Protective Services staff is responsible for the legal aspects of the case and stays involved through the adjudication phase. In many jurisdictions, foster care staff will begin to take on the social work role at the preliminary hearing or shortly thereafter. As a result, during the time between the preliminary hearing and the adjudication of the case, both foster care and Child Protective Services staff can be actively seeking an absent parent.

The amount of information that foster care or Child Protective Services staff has regarding absent parents will vary depending upon the case. In many counties, Child Protective Services has placed a high value on providing services and interventions for low- and moderate-risk families. In these cases, because of their prior involvement with the family, Child Protective Services staff is more likely to have information regarding an absent parent. In more egregious cases where a petition is filed immediately, Child Protective Services' involvement is limited to investigation and substantiation.

B. Minimum Requirements for Identifying and Locating an Absent Parent

Child Protective Services, foster care, and private agency workers have specific duties concerning the identification and location of absent parents that vary depending upon the circumstances of the case. However, in all cases the absent parent issue should be addressed from the onset. At a minimum, Child Protective Services should ask the parent with whom they have contact about the identity and whereabouts of the absent parent, and be prepared to discuss the issue at the preliminary hearing. Because the case responsibilities begin to transition from Child Protective Services to foster care after the preliminary hearing but before the adjudication, local Child Protective Services and foster care staffs will need to develop a process to assure continued diligent efforts to find absent parents.

1. Diligent Search

A diligent search will include interviewing the child's custodial parent and other relatives, checking telephone and other directories, and initiating a search through the local friend of the court or the Department of Human Services' Office of Child Support. (See Section IV: Resources for Office of Child Support Information.) If the efforts fail to reveal an absent parent's identity or location, an *Affidavit of Efforts to Locate Absent Parent* (JC 83) should be completed prior to the time when notice is required for an upcoming trial. This affidavit outlines the efforts made to identify and locate the absent parent, and is submitted to the court along with a *Motion for Alternate Service of Process* (JC 46) on the absent parent.

The Department of Human Services' policy requires a foster care worker to:

- determine whether the mother was married at the time of conception or birth by talking with the mother and relatives,
- determine whether the parents are divorced and, if so, whether either parent is paying child support,
- review the child's birth certificate to see if a father is listed,
- contact the friend of the court or the Central Functions Unit within the Office of Child Support to determine whether anyone has been paying child support,
- contact the family division of the circuit court to determine whether an order of filiation has been entered, and
- contact the probate court to determine whether an affidavit of parentage has been filed.¹

Other ways to locate an absent parent include: conducting a statewide Client Information System inquiry and a Secretary of State inquiry, searching telephone books and U.S. Post Office addresses, conducting a friend of the court inquiry, checking with the county clerk's office for vital statistics, contacting the absent parent's last place of employment, following up on leads provided by friends and relatives, and seeking legal publication. A

¹ Acknowledgements of parentage are required to be filed with the state registrar. Subsequent proceedings on the acknowledgement are proper in the circuit court.

foster care worker may use the Federal Parent Locator Service if he or she knows the absent parent's social security number; the Department of Human Service's "Free Parent Locator Services" at http://www.michigan.gov/fia/0,1607,7-124-5453_5528_6741---,00.html; and the Michigan Department of Corrections "Offender Tracking Information System" at <http://www.michigan.gov/corrections/0,1607,7-119-1409---,00.html>.

2. Paternity Testing

Child Protective Services and foster care staff have access to free paternity testing as follows:

a. Paternity Testing Through the Office of Child Support

The Office of Child Support will provide paternity testing services if foster care staff makes a referral to the Office of Child Support for the purpose of establishing paternity and/or a support order. The court may order the foster care worker to make a referral to the Office of Child Support. There are two advantages to requesting paternity testing through the Office of Child Support:

- ninety percent (90%) of the cost for testing is paid through federal reimbursement with the remaining 10% paid through county funds, and
- more than one test can be requested.

To access paternity testing a referral is made to the Office of Child Support using Form DHS-3205. Paternity testing will be available for cases in which the mother/father status code is either 05 or 06 on the Medicaid case.

Note: These services are not available in cases where the court orders paternity testing without an Office of Child Support referral. There must be a Title IV-D case to access federal funding for testing.

b. Paternity Testing Through the Department of Human Services Contract Services

An agreement has been established for paternity genetic testing services through Orchid Cellmark, with all costs paid by the Department of Human Services Central Office. To arrange an appointment for parentage testing/specimen collection, workers should contact Orchid Cellmark directly by phone (800-443-2383) or FAX (937-294-3385). Key factors to remember:

- the service is not to establish child support,
- the service is available one time per client,
- workers requesting this service must ensure that previous test results are not available through other sources such as the Office of Child Support or the friend of the court, and
- pictured identification and social security numbers for parents and children are required at the time of the appointment.

For more information, refer to the Department of Human Services L-letter 99-084 (or subsequent L-letters on the topic).

Note: Private agency foster care workers should consult with their Department of Human Services contract manager for guidance on how to access this service.

C. Sharing Information

If Child Protective Services staff has been unable to identify the absent parent prior to filing the petition, any relevant information should be provided to the assigned foster care worker, including:

- Any efforts to locate the absent parent that are pending at the time of the transfer.
- Any efforts that may benefit from continued attention. For instance, since Child Protective Services has likely been involved in removing the child from the home, the relationship with the custodial parent may not be conducive to sharing information. A foster care worker may be able to create a more positive relationship and elicit more useful information.

Because of the different people potentially involved in efforts to locate absent parents, it is vital that information be shared in a timely manner. This includes good communication between Child Protective Services and foster care staff. Protocols must be established between the Department of Human Services and private agencies to ensure that foster care staff have access to the resources available for finding absent parents and for establishing paternity.

Note: Private agency foster care staff will need to access the services of the Office of Child Support through their contract monitor with the Department Of Human Services.

D. Petitions

A petition must identify both legal parents or identify a father as a putative father. **Failure to ensure that a parent is named as a respondent when it is appropriate to do so is a frequent reason for permanency delays.**

If a legal father exists, only the legal father may be named as a respondent in a petition requesting termination of parental rights. If a father's identity is unknown, it should be stated in the petition. In most cases, if the absent legal parent is not involved in the child's life, has not sought custody of the child, and there is no indication that the absent parent intends to provide for the proper care and custody of the child, the court may assume jurisdiction and the absent parent's parental rights may be terminated for desertion or failure to provide proper care or custody.

If appropriate, allegations of desertion or child neglect by an identified father should be included in the original or an amended petition. The allegations against the absent parent do not have to be the same as those that brought the parent with custody to the attention of the court.

Including the absent parent as a respondent in the original petition, if appropriate, or amending the petition to include the absent parent when allegations surface later, can:

Preserve the Absent Parent's Right to a Jury Trial. A party to a child protective proceeding may demand that a jury decide whether the facts alleged in the petition bring the child within the court's jurisdiction. The demand for a jury trial must be filed no later than 21 days before trial, unless the court excuses a later filing in the interests of justice. However, once jurisdiction over a child has been established through one parent's plea or at a trial of allegations against one parent, another parent has no right to demand a jury trial of allegations against him or her. Therefore, an absent parent's right to a jury trial depends on being identified and notified prior to adjudication.

Resolve Evidentiary Issues: Legally admissible evidence is not required where parental rights are terminated in a typical child protective proceeding and termination is sought under a supplemental petition after the parent or parents have had an opportunity to improve their parenting ability. However, if an absent parent is not named as a respondent before termination of parental rights is requested, and the allegations against the absent parent are new or different from those allowing the court to take jurisdiction, then legally admissible evidence must be used to establish a legal basis for termination of parental rights for the absent parent. While the absent

parent is rightfully entitled to such protection, the stricter evidentiary standards could preclude the admission of relevant information concerning the absent parent that would have been admissible if the absent parent had been named as a respondent in the action prior to adjudication.

Ensure the Absent Parent's Early Involvement in the Case Service Plan. Absent parents who may have an interest in creating a parental relationship with the child are much more likely to respond to legal notice of the proceedings and become involved in the case service plan early on. Therefore, it is important to include an absent parent as a respondent, if appropriate. In too many cases, absent parents seeking to assert their parental rights have emerged only after it has become apparent that the custodial parent will likely lose parental rights, which delays permanency for the child.

When amending a petition, Child Protective Services, foster care, and private agency staff must cooperate and share information regarding allegations against an absent parent.

E. Two Quick Resources for Locating Absent Parents

Federal Parent Locator Service (FPLS)

- FPLS is a good resource for an initial search and is available to foster care staff
- Having the social security number is extremely helpful when making the request
- FPLS requests can be made without opening a case for support
- To request FPLS, send an e-mail to FIA-OCS-CFU-Staff1@michigan.gov (include "Locate" in the subject line or, for urgent requests, "Locate-Urgent") or call 866-281-0031

Paternity and Payment Inquiries

The Office of Child Support can confirm whether paternity has been established for children involved in Child Protective Services investigations. The Central Functions Unit of the Office of Child Support will provide:

- paternity information,
- the last known address of the noncustodial parent,
- payment information on the court order, if one exists, and
- the progress of the Office of Child Support's efforts to locate and/or establish paternity.

Contact the Central Functions Unit at 866-281-0031

F. Checklist for Information Sharing and Communication

Petitions

- ☐ Is there a local process for exchanging information between foster care and Child Protective Services staff to:
 - ☐ Ensure the transition of responsibilities as a case moves from Child Protective Services to foster care?
 - ☐ Amend an original petition?
- ☐ Is there a lead person at Child Protective Services for this purpose?
- ☐ Do private agency staffs work through a Department of Human Services monitoring worker at the local Department of Human Services office, or can they contact Child Protective Services directly?
- ☐ Does the prosecutor's office (or other agency providing legal representation) assist in filing amended petitions?

Services

- ☐ Do private agency staff know key contacts at the local Department of Human Services to access services such as paternity testing and parent locating through the Office of Child Support?
- ☐ Has an appropriate protocol been established with the Office of Child Support so that:
 - ☐ The Department of Human Services and contract agency staff know who to contact to request a search?
 - ☐ Both the Department of Human Services and contract agency staff know that the Office of Child Support's progress can be tracked by calling the Central Functions Unit at (866) 281-0031?
 - ☐ The Department of Human Services and contract agency staff notify the Office of Child Support if a parent has been identified or located independently of the requested search?
- ☐ Do all parties involved in search efforts have an agreed upon local protocol for communicating results to the court, including, if appropriate, the filing of an amended petition?

Section III: COURT PROCEEDINGS

The court's leadership can significantly influence the effort to locate absent parents. A successful protocol for identifying, locating, and involving absent parents depends on a local system that requires attention to the issue at the earliest point and at every subsequent proceeding. Although locating absent parents is primarily the responsibility of non-court staff, the court lends credence to this effort by ensuring, as part of court review, that absent parents are aggressively pursued.

A. Raising the Issue of Paternity and the Identity and Location of an Absent Parent

1. Questioning the Custodial Parent

If a child's absent parent has not been identified, the referee or judge who conducts a preliminary hearing must inquire of the child's custodial parent or anyone else present who has information regarding the identity and whereabouts of the child's absent parent. The court may place the parent who is present under oath and take testimony as to the identity and whereabouts of the absent parent. This approach can be useful when the court suspects that the parent who is present knows more about the absent parent's identity and location than he or she has been willing to admit. In these situations, Child Protective Services or foster care staff should be prepared to explain to the court why such testimony might be warranted.

2. Questioning the Petitioner

It is an essential role for the presiding jurist to raise the absent parent issue at every child protective proceeding until the absent parent's identity or location is established. The court may ask the Child Protective Services or foster care worker the following questions, as appropriate:

- Did you ask the available parent about the identity and whereabouts of the absent parent?
- Have you contacted friends and relatives of both the available and the absent parent?
- Did you check the telephone directory?

- Have you compiled complete information on the absent parent, such as:
 - Name?
 - Last-known address?
 - Phone numbers?
- Did you check the city directory? (if one exists)
- If none of the above was successful, have you explored other sources, such as:
 - Referral to the Office of Child Support to establish child support?
 - Contact with the local friend of the court or the Office of Child Support's Central Functions Unit to determine whether a support order exists?
- Did you look for other legal documents?
 - Is a father listed on the birth certificate?
 - Is an acknowledgment of parentage on file in the circuit court or with the State of Michigan?
 - Is an order of filiation or judgment of paternity on file with the circuit court?
 - If paternity has been established, was it verified by the Office of Child Support? *Note: The Office of Child Support is paperless; the support specialist workers have access to the Central Paternity Registry, but do not have access to certified copies.*
- If the child has no legal father, is a putative father hearing appropriate?
- If parentage is in question, is paternity testing in process or complete?
- If the absent/noncustodial parent has been identified, but not located, have you collected the following information and, if appropriate, included it in the petition?
 - Does the absent parent have a criminal history?
 - Does the absent parent have a Child Protective Services history?
 - Has the absent parent ever contributed to the financial support of the child(ren)?
 - Has the absent parent ever had custody of the child(ren)?
 - Have any of the absent parent's relatives ever been involved in caring for the child(ren)?
 - To what extent has the absent parent maintained contact with the child(ren) or otherwise shown interest?
 - Are there other factors that would indicate the absent parent's willingness and/or ability to care for the children?

B. Conducting a Serafin Hearing

If a child's mother was married at any time from conception to birth of a child involved in the proceedings, and if the mother or legal father alleges that the legal father is not the biological father of the child, the court must conduct a hearing to determine whether the presumption of the child's legitimacy has been rebutted by clear and convincing evidence. (This hearing is commonly called a "Serafin hearing" from the Michigan Supreme Court case that established the requirement. (*Serafin v Serafin*, 401 Mich 629 (1977))).

Note: See Appendix 2 for more information concerning when and under what circumstances a Serafin hearing is conducted.

C. Conducting a Putative Father Hearing

If a child has no legal father, and if the court has reason to believe that an identified person is the child's biological father, the court may take testimony to attempt to establish the identity and address of the child's alleged biological father. If the court finds probable cause to believe that an identifiable person is the child's biological father, the court must direct that notice be served on that person that a hearing is scheduled to determine his interest, if any, in the child.

The court must direct that notice be served on a putative father in any manner reasonably calculated to provide notice, including publication if his whereabouts remain unknown after diligent inquiry. However, a published notice must not contain the putative father's name. Notice by publication must be provided if the putative father's identity is unknown. The court rule also requires that the notice to the putative father contain the following information:

- If known, the name of the child, the name of the child's mother, and the date and place of birth of the child,
- That a petition was filed with the court,
- The time and place of hearing at which the natural father is to appear to express his interest, if any, in the minor, and
- A statement that failure to attend the hearing will constitute a denial of interest in the minor, a waiver of notice for all subsequent hearings, a waiver of a right to appointment of an attorney, and possible termination of any parental rights.

After directing notice to an identified or unidentified putative father, the court may make one of several findings. First, the court may determine that a putative father has been served in a

manner reasonably calculated to provide notice. The court may also determine by a preponderance of the evidence that the putative father is the child's biological father and allow him 14 days (or more for good cause shown) to establish legal paternity according to the definitions set forth in Section I, above. Alternatively, the court may find probable cause to believe that another identified man is the child's biological father and direct that notice be provided to that person as stated above. If an identified putative father fails to appear after proper notice or appears but fails to timely establish paternity, the court may find that he waives all rights to further notice, including the right to notice of termination of parental rights, and the right to an attorney. Finally, the court may determine that a diligent inquiry has been conducted and the identity of the child's biological father cannot be determined. If the court makes this finding, it may proceed without further notice and without appointing an attorney for the unidentified person.

Until a child's putative father has legally established his paternity of the child, a putative father is not entitled to receive notice of or participate in child protective proceedings, or to court-appointed counsel.

D. Requiring Amendments to Petition

The court should require counsel for the petitioner to add allegations against an absent parent by amended petition. While this protocol emphasizes inclusion of an absent parent as a respondent in an original petition, in some cases foster care or Child Protective Services staff will discover information about an absent parent that needs to be added in the form of an amended petition. When such amendments are made, the absent parent must be served with an amended petition and summons. If personal service cannot be achieved, service may be made by registered mail or publication, with the court's approval. The absent parent is then a respondent to the proceedings and under the jurisdiction of the court.

E. Ensuring Service of Process

1. Serving the Respondent

Ensure that a summons is personally served on a respondent for an adjudicative hearing and, if held, a hearing on termination of parental rights. If the respondent is an absent parent, include:

- Summons: Order to Appear (Child Protective Proceedings) (JC 21)
- Petition (JC 04)
- Notice of Hearing (JC 45)

2. Serving the Noncustodial Legal Parent

Notice for a noncustodial legal parent who is not a respondent is provided by personal service of the *Notice of Hearing* (JC 45) and a copy of the petition. If personal service cannot be achieved, the court may order service of process be made by mail or publication. In addition, the court may issue a summons requiring the appearance of anyone whose presence is found by the judge to be necessary. Therefore, in some cases a nonrespondent parent may receive a summons as well.

A summons to appear at a child protective proceeding clarifies the purpose of the proceeding, the party's rights, and the consequences for failure to appear.

In addition to the court providing the summons, the foster care worker should communicate to both the custodial and the noncustodial parents the importance of staying involved in court proceedings and complying with the case service plan.

3. If a Respondent or Noncustodial Legal Parent is Incarcerated

If a respondent or noncustodial legal parent is incarcerated under the jurisdiction of the Department of Corrections, the petitioner must also comply with MCR 2.004. The petitioner must:

- contact the Department of Corrections to confirm the incarceration and the incarcerated party's prison number and location,
- serve the incarcerated person with the petition or motion seeking an order regarding the minor child, and file proof with the court that the papers were served, and
- file with the court the petition or motion seeking an order regarding the minor child stating that a party is incarcerated and providing the party's prison number and location. The caption of the petition or motion shall state that a telephonic hearing is required by this rule.

The court must then issue an order requesting that the Department of Corrections, or a non-Department of Corrections facility where the respondent or parent is located, allow

the respondent or parent to participate in a hearing or conference via a non-collect and unmonitored telephone call. The court must serve the order on the parties and the warden or supervisor of the facility where the respondent or parent resides.

4. If Personal Service is Impracticable or Cannot be Achieved

If a summons cannot be personally served on a respondent, the court may order alternate service in any manner reasonably calculated to provide actual notice. To do so, the court must find on the basis of testimony, a motion and affidavit, or any other information that personal service is impracticable and cannot be achieved. Use SCAO-approved *Motion for Alternate Service* (JC 46) and *Order for Alternate Service* (JC 47) for this purpose

Diligent efforts to locate and personally serve an absent legal parent are required before asking the court to approve a motion for alternate service. A caseworker should use an *Affidavit of Efforts to Locate Absent Parent* (JC 83) when filing a motion for alternate service to demonstrate that diligent efforts were made to locate the absent parent. On the form, the caseworker will affirmatively state that diligent efforts have been made to locate an absent parent. In addition, it establishes a request for a search by the Office of Child Support as a “diligent efforts” standard when other activities prove unsuccessful.

5. Alternate Service

If a parent’s whereabouts are known but personal service cannot be achieved, service may be made in “any manner reasonably calculated to give notice of the proceeding and an opportunity to be heard,” including registered or certified mail addressed to the last known address. If a parent’s whereabouts are unknown, the court may order service by publication. However, a court should not order service by publication or any other substituted service if the petitioner has not made reasonable efforts to locate the absent legal parent. A motion for alternate service must show that the substituted method of service is best suited to provide actual notice of the proceedings to the absent parent.

F. Ongoing Attention During the Dispositional Phase of Proceedings

This protocol is designed to promote early, intensive, and coordinated efforts for finding and, if appropriate, involving an absent parent in a child protective proceeding. In most cases these efforts will resolve the issue early in the process. However, in some situations, absent parent issues may linger beyond the adjudicatory phase of a child protective proceeding. In these cases, the judge or referee should raise the issue of an absent parent at each court proceeding after

adjudication so long as questions remain. Depending upon the circumstances, any of the following may be appropriate review questions.

- ***Identity and whereabouts are not known***

What continued efforts have been made to identify and locate the absent parent?

- ***Identity is known but efforts to locate have not been successful***

What continued efforts have been made to locate the absent parent?

- ***Identity is believed to be known, but parentage is being denied or is in question***

What steps have been taken to determine parentage?

- ***Parentage has been determined since the last court hearing***

What has been done to engage the absent parent involved in the child's life, or to establish that the parent has no interest?

G. New Information Discovered During the Dispositional Phase—Supplemental Petitions

If the agency responsible for a child's care and supervision becomes aware of additional abuse or neglect of a child who is under the jurisdiction of the court, and if that abuse or neglect is substantiated, the agency is required to file a supplemental petition with the court. If the supplemental petition does not request termination of parental rights, the court may address the petition at a review hearing or progress review. If the supplemental petition requests termination of parental rights, the court must conduct a hearing under MCR 3.977. In either case, the court is not required to redetermine its jurisdiction over a child, and a respondent to the new allegations in the supplemental petition is not entitled to a jury trial on those allegations. However, a respondent to the supplemental petition must be notified of a review hearing at which the new allegations will be addressed or, if termination of parental rights is requested, must be personally served with a summons and a copy of the supplemental petition.

H. Termination of Parental Rights of Absent Parents

If termination of parental rights is requested, only a child's legal father may be identified in the petition. If no legal father exists and proper notice has been provided to a putative father, the court may terminate any parental rights that putative father may possess. If a child has no legal

father, and a putative father has or had an established custodial or support relationship with the child but has failed to legally establish his paternity for that child, the court may terminate any parental rights that putative father may have pursuant to the Juvenile Code. If neither a legal father nor a putative father has been identified, the court may include in its order a provision that terminates the rights of the child's mother and sole legal parent, and the rights of the child's biological father, including any rights the unidentified father may have.

At least one statutory ground for termination of the absent legal parent's parental rights must be properly alleged and set forth in the supplemental petition (e.g. abandonment, failure to provide proper care of custody).

A respondent-parent must be personally served with a summons and a copy of a petition requesting termination of that parent's rights. If personal service is impracticable or cannot be achieved, an alternate method of service may be used.

If the court has entered a dispositional order placing a child in the temporary custody of the court, the court may not proceed to a hearing on termination of parental rights without issuing a new summons and ensuring proper service of that summons. A respondent-parent must be personally served with a summons and a copy of a petition requesting termination of parental rights. The rules governing service in child protective proceedings include provisions for substituted service, including service by registered mail or publication, when personal service is impracticable or the parent's whereabouts are unknown. Before resorting to notice by publication, however, the court must determine whether reasonable efforts were made to locate the absent parent. MCR 3.920.

Section IV: RESOURCES

THE OFFICE OF CHILD SUPPORT

The Office of Child Support (OCS) has access to a variety of resources that can be extremely helpful in efforts to locate an absent parent and is willing to work with Department of Human Services staff to assist in locating absent parents.

Federal Parent Locator Service (FPLS)

- FPLS is a good resource for an initial search and is available to foster care staff
- Having the social security number is extremely helpful when making the request
- FPLS requests can be made without opening a case for support
- To request FPLS, send an email to FIA-OCS-CFU-Staff1@michigan.gov (include "Locate" in the subject line or, for urgent requests, "Locate-Urgent") or call (866) 281-0031.

Paternity and Payment Inquiries

The Office of Child Support will determine whether paternity has been established for children involved in Child Protective Services investigations.

The Central Functions Unit of the Office of Child Support will provide the following:

- Paternity information
- Last known address of the noncustodial parent
- Payment information on a court order, if one exists

Contact the Central Functions Unit by calling (866) 281-0031.

Requesting Assistance

The following available information should be provided when requesting assistance of the Office of Child Support. Make sure that information (dates, spellings, etc.) is accurate.

- | | |
|--|------------------------------------|
| • Social security number | • Date of birth |
| • Driver's license number | • Last place of employment |
| • Last known address | • Hometown |
| • Prior or subsequent marriages/children | • Miscellaneous family information |
| • Spelling of party's names | • Mother's maiden name |

You can find out the progress of efforts to locate and/or establish paternity and child support by calling the Central Functions Unit at 866-281-0031.

Office of Child Support Assistance Eligibility

A threshold requirement for assistance from the Office of Child Support is that the child must be eligible for any of the following programs.

- Family Independence Program (FIP)
- Title IV-E (foster care maintenance payments)
- Child Development Care (CDC)
- Food Assistance Program (FAP)
- Medicaid

There are two ways the Office of Child Support Services can provide help for children in substitute care:

- **Public Assistance Eligibility.** Any child who is currently eligible or is a former recipient of FIP or Medicaid (this includes county and state funded foster care placements) is eligible for Office of Child Support assistance. Also, if IV-E maintenance payments are being made, the child is also IV-D eligible and services can be requested from the Office of Child Support. An automated referral is made via the Customer Information System (CIMS) to the Michigan Child Support Enforcement System (MiCSES) by coding the mother/father status codes correctly on the child's Medicaid case.
- A request for IV-D services can be made by a relative caregiver who is not receiving a foster care payment or FIP and/or Medicaid. Relative caregivers in this category request services by completing a Form DHS-1201: *Non-FIP Child Support Services Application* and submitting it to the Office of Child Support at the following address:

Office of Child Support
Attn: Central Functions Unit
235 S. Grand Avenue
Lansing, MI 48909

FRIEND OF THE COURT

The local friend of the court may assist in locating an absent parent. The friend of the court has access to the Michigan Child Support Enforcement System database and can access information for all 83 counties in Michigan.

Access to the friend of the court will require agreements at the local level to establish a protocol for sharing information. In communities where agreements are reached, the friend of the court will need as much of the following information as possible:

- Full name of the absent parent (including any alias)
 - Date of birth
 - Social security number
 - Last known address, employer, and phone number
 - Marital status
- Full name of custodial parent
 - Date of birth
 - Social security number
- Full names of children, including date of birth and social security numbers

OTHER RESOURCES

Other Office of Child Support parent locating resources include:

- Department of Consumer and Industry Services
- Department of Natural Resources (hunting and fishing license)
- Department of Defense (military enrollment)
- Department of Corrections (offender tracking system)
- Secretary of State
- U.S. Postal Service
- New hire database
- Quarterly wage data

APPENDICES

Appendix 1: Legal Fathers – Identifying a Child’s Father

Section I of this protocol emphasizes the need to identify whether there is a legal father before determining if there is a putative father. This appendix provides more detailed information on the five ways identified in Section I that a man may be established as a legal father. A man may be found to be a legal father if he:

1. ***Is married to the child’s mother at any time from the child’s conception to the child’s birth.*** If the child’s mother is married at any time from the child’s conception to birth, the man to whom she is married is presumed to be the child’s legal father. Note that a child’s presumed legal father is not necessarily the child’s biological father. For example, if an unmarried woman conceives a child with a man then marries another man prior to the child’s birth, the woman’s husband is the child’s presumed legal father, not the man with whom she conceived the child.

If a legal father exists, a putative father (an alleged biological father) is not identified nor allowed to participate in a child protective proceeding. Only the child’s mother or legal father may attempt to rebut this presumption of the child’s legitimacy. If the presumption is rebutted, the court in a child protective proceeding may find that the child was “not an issue of the marriage,” but the court may not make a legal determination that the putative father is the child’s legal father. Instead, the child’s putative father must establish legal paternity under the Paternity Act² or, if the child’s mother consents, under the Acknowledgment of Parentage Act.

2. ***Has legally adopted the child.***
3. ***Has been determined to be the child’s legal father in an order of filiation or judgment of paternity as a result of an action under the Paternity Act.*** Actions under the Paternity Act are only available when a child is born out of wedlock, i.e. when the child’s mother is unmarried during the entire gestation period or the mother gets married during that period, but a court has previously determined that the child is not a product of the marriage.

² If the foster care worker makes a referral to the Child Support Unit and the prosecuting attorney files an action under the paternity act, the prosecuting attorney’s office is reimbursed for this activity under the IV-D contract.

4. ***Has been determined by a judge in a divorce action to have parental rights.*** In a divorce action, there are two situations where a judge may determine that a husband who is not a child's biological father has parental rights. First, a judge may determine that a man is an "equitable father" if:

- he is married to the child's mother, but is not the biological parent of a child born or conceived during the marriage,
- he and the child mutually acknowledge a relationship as father and child, or the child's mother has cooperated in the development of a father-child relationship over a period of time prior to filing for divorce,
- he desires to have the rights afforded to a parent, and
- he is willing to take on the responsibility of paying child support.

Second, a judge may determine that a man should be estopped (prevented) from denying he is a child's legal father if the man is married to the child's mother, is not the child's biological father, does not want the rights afforded to a parent, and refuses to pay child support. A judge may assign such a man parental rights if it would be unfair not to do so. For example, a judge may assign the man parental rights if he married the child's mother while she was pregnant knowing that he was not the child's biological father, or if the man dissuaded the child's mother from placing the child for adoption and agreed to raise the child as his own.

For a man to be determined to have parental rights in a divorce action, the man and the child's mother must be married to one another. The circumstances outlined in this section do not apply to unmarried people.

5. ***Has been determined to be a child's legal father by the proper filing of an acknowledgment of parentage.*** A child's mother and biological father must both sign the acknowledgment of parentage, which must then be filed with the state registrar. As under the Paternity Act, actions under the Acknowledgment of Parentage Act are only available when a child is born out of wedlock, i.e. when the child's mother is unmarried during the entire gestation period or the mother gets married during that period, but a court has previously determined that the child is not a product of the marriage.

If there is no legal father, the court may identify a putative father. A putative father is an alleged biological father of a child who has no legal father as defined above. If a legal father exists, a putative father may not be identified or participate in a child protective

proceeding unless the presumption of a child's legitimacy is rebutted as explained under Section (1) of this Appendix. If no legal father exists, a court may conduct a putative father hearing to identify the alleged father, facilitate notification of the alleged father, and allow him to legally establish his paternity of the child.

If a child's mother is married at the time of birth, the mother's husband must be identified as the father on the child's birth certificate. If a child's mother is unmarried at the time of birth, a father's name may not be placed on the child's birth certificate without the completion and filing of an acknowledgment of parentage or a court order following a paternity action.

Appendix 2: Conducting a Serafin Hearing (*Serafin v Serafin*, 401 Mich 629 (1977))

In Section III (Court Proceedings), the right of legal parents to petition the court for a Serafin hearing is discussed. (The name of this hearing is derived from the Michigan Supreme Court case that established the ability of a legal parent to rebut the presumption of a child's legitimacy, Serafin v Serafin, 401 Mich 629 (1977)). This appendix explains more fully the circumstances under which a legal father may seek a court determination as to whether he is, in fact, the biological parent when there is an existing legal presumption of his parentage.

If a child's mother is married at any time from the child's conception to birth, the mother's husband is presumed to be the child's legal father. This presumption of legitimacy applies in child protective proceedings. When a child is conceived or born during a marriage, a strong, though rebuttable, presumption of legitimacy arises, but the husband or wife may testify regarding nonaccess to one another. This presumption of legitimacy must be rebutted by clear and convincing evidence.

If both legal parents assert the presumption of legitimacy, third parties (i.e., a putative father) may not attack it. If both legal parents attack the presumption, it may be rebutted through their testimony alone. A legal father may contest paternity with the results of a paternity test. Test results that preclude the possibility that a man is a child's biological father are conclusive and sufficient to rebut the presumption of legitimacy. Similarly, a child's mother may contest the legal father's paternity by requesting that a court order the legal father to submit to testing. A mother's testimony that she is uncertain whether the legal father is the biological father has been held insufficient to rebut the presumption of legitimacy.

Where a legal father exists, a putative father may not be identified or participate in child protective proceedings. However, if the mother and legal father rebut the presumption of legitimacy during the child protective proceeding, a court may make a finding that a child is not the issue of a marriage. The court may not, however, determine a child's paternity within the child protective proceeding. Instead, a putative father may be allowed an opportunity to establish his paternity in a separate proceeding, as provided in Section III of this protocol. The court's finding that the child is not an issue of the marriage qualifies as a prior court finding, allowing the putative father to proceed under the Paternity Act. If the putative father properly establishes his paternity, he then has standing to participate in the child protective proceeding.

A putative father does not have standing to intervene in a child protective proceeding following termination of the legal father's parental rights. Termination of the mother's and legal father's parental rights is not a determination that the child was not the issue of the marriage.

October 2005

Update: Criminal Procedure Monograph 1—Issuance of Complaints & Arrest Warrants (Revised Edition)

Part A — Commentary

1.8 Required Signatures on a Complaint

B. Signature and Oath of Complaining Witness

Replace the first bullet near the top of page 18 with the following:

- The victim is a spouse or former spouse of the defendant, has a child in common with the defendant, resides or has resided in the same house as the defendant, or has or has had a dating relationship with the defendant;* and

Delete the **Note** immediately preceding Section 1.9 on page 18.

*2005 PA 106,
effective
September 14,
2005.

Update: Criminal Procedure Monograph 2—Issuance of Search Warrants (Revised Edition)

Part A — Commentary

2.13 The Exclusionary Rule and Good Faith Exception

Insert the following text after the June 2005 update to page 25:

In determining whether the good-faith exception applies to a search conducted pursuant to an invalid search warrant, *United States v Laughton** does not establish a blanket prohibition against a reviewing court's consideration of evidence not included in the four corners of the affidavit on which the warrant was based. *United States v Frazier*, ___ F3d ___ (CA 6, 2005). According to *Frazier*, information known to a police officer *and* provided to the issuing magistrate—even if it was not included in the four corners of the affidavit in support of the warrant—may be considered in determining whether an objectively reasonable officer was justified in relying on the warrant.

The Sixth Circuit concluded that the facts in *Frazier* were distinguishable from the facts in *Laughton* because “[*Laughton*] gives no indication that the officer who applied for the search warrant provided the issuing magistrate with the information omitted from the affidavit.” *Frazier, supra* at ___. For purposes of determining whether the good-faith exception should apply to an unlawful search, *Laughton* prohibits the consideration of information not found within the four corners of the affidavit when there is no evidence that the information was provided to the magistrate who issued the warrant. According to *Frazier*, information known to an officer but not found in the supporting affidavit may be considered if the information was revealed to the issuing magistrate.

*409 F3d 744
(CA 6, 2005).

Update: Criminal Procedure Monograph 6—Pretrial Motions (Revised Edition)

Part 2—Individual Motions

6.36 Motion to Suppress Evidence Seized Pursuant to a Defective Search Warrant

Insert the following text after the June 2005 update to page 87:

In determining whether the good-faith exception applies to a search conducted pursuant to an invalid search warrant, *United States v Laughton** does not establish a blanket prohibition against a reviewing court's consideration of evidence not included in the four corners of the affidavit on which the warrant was based. *United States v Frazier*, ___ F3d ___ (CA 6, 2005). According to *Frazier*, information known to a police officer *and* provided to the issuing magistrate—even if it was not included in the four corners of the affidavit in support of the warrant—may be considered in determining whether an objectively reasonable officer was justified in relying on the warrant.

The Sixth Circuit concluded that the facts in *Frazier* were distinguishable from the facts in *Laughton* because “[*Laughton*] gives no indication that the officer who applied for the search warrant provided the issuing magistrate with the information omitted from the affidavit.” *Frazier, supra* at ___. For purposes of determining whether the good-faith exception should apply to an unlawful search, *Laughton* prohibits the consideration of information not found within the four corners of the affidavit when there is no evidence that the information was provided to the magistrate who issued the warrant. According to *Frazier*, information known to an officer but not found in the supporting affidavit may be considered if the information was revealed to the issuing magistrate.

*409 F3d 744
(CA 6, 2005).

Update: Juvenile Traffic Benchbook (Revised Edition)

CHAPTER 4

Dispositions for Criminal Traffic Violations

4.5 Restitution, Crime Victim's Rights Assessment, and Reimbursement of Costs of Service

A. Restitution

“Victim” defined.

On page 50, add the following text to the end of the first paragraph:

MCL 712A.30(1)(b) states in part:

“For purposes of subsections (2), (3), (6), (8), (9), and (13), victim includes a sole proprietorship, partnership, corporation, association, governmental entity, or other legal entity that suffers direct physical or financial harm as a result of a juvenile offense.”

MCL 780.794(1)(b) contains substantially similar language.

In *In re McEvoy*, 267 Mich App 55 (2005), the trial court ordered the juvenile and his parents to pay restitution to a school district's insurer. On appeal, the juvenile's parents argued “that pursuant to the definition of ‘victim’ in MCL 712A.30(1)(b), the school district is a victim for purposes of only ‘subsections (2), (3), (6), (8), (9), and (13)’ and therefore parents may not be required to pay restitution under subsection (15) to a ‘non-individual’ victim.” *McEvoy*, *supra* at 63. The Court of Appeals rejected this argument, stating:

“Foremost in negating appellants’ logic is the fact that the word victim does not appear in subsection (15), and therefore there is no need to define the term for purposes of that subsection. Further, the key language in the definition of the term ‘victim’ is identical in both the juvenile code and the CVRA[.] . . . Subsection (2) is the key substantive provision providing for restitution and that

subsection expressly states that the court shall order that the juvenile ‘make full restitution to any victim,’ which by definition includes a legal entity such as the school district.” [Citations and footnotes omitted.] *McEvoy, supra* at 64.

More importantly, a review of the restitution provisions in both the Juvenile Code and CVRA reveal that the subsections not applicable to the definition of “non-individual” victims have no logical application to legal entities (e.g., restitution for physical or psychological injuries or death) or are primarily procedural. *Id.* at 64–65.

CHAPTER 4

Dispositions for Criminal Traffic Violations

4.5 Restitution, Crime Victim's Rights Assessment, and Reimbursement of Costs of Service

A. Restitution

“Victim” defined.

Insert the following text after the partial paragraph at the top of page 52:

In *In re McEvoy*, 267 Mich App 55 (2005), the trial court ordered a juvenile's parents to pay restitution to a school district's insurer for damage caused by the juvenile setting fire to a high school. The restitution amount was based on the amount the insurer paid to the insured under the insurance policy—the replacement value of the damaged property. The Court of Appeals vacated the restitution order and remanded for redetermination of the amount of loss actually suffered by the school district. *Id.* at 75. The Court construed MCL 712A.30(8), which, like MCL 780.794(8), requires a court to order restitution to a legal entity that has compensated a direct victim “for a loss incurred by the [direct] victim to the extent of the compensation paid for that loss.” The Court stated that under MCL 712A.30(8), “an entity that compensated a victim ‘for a loss incurred by the victim’ is entitled to receive restitution ‘to the extent of the compensation paid for *that* loss,’ clearly meaning the loss of the victim, not the loss of the compensating entity.” *McEvoy, supra* at 76. The Court noted that the statutory provisions for calculating restitution for property damage or destruction use the value of the property damaged or destroyed—the victim's actual loss—as the basis for a restitution order. The Court stated:

“Under the circumstances of the case, the loss of the compensating entity is based on the commercial transaction involved, i.e., the school district's purchase of replacement coverage insurance, rather than the loss resulting from the fire, which underscores that the result is incongruent with the purpose of the statute. Although the amount of restitution is within the discretion of the trial court, the court erred to the extent it ordered restitution to SET-SEG on the basis of the amount SET-SEG compensated the school district, rather than the amount of the actual loss sustained by the school. Restitution must be based on the value of the property damaged, i.e., the victim's actual loss.” *Id.* at 77–78.

CHAPTER 4

Dispositions for Criminal Traffic Violations

4.5 Restitution, Crime Victim's Rights Assessment, and Reimbursement of Costs of Service

A. Restitution

Ordering a juvenile's parent to pay restitution.

On page 57 immediately before subsection (B), insert the following text:

The Juvenile Code does not limit the amount of restitution for which a supervisory parent may be held liable. *In re McEvoy*, 267 Mich App 55, 67 (2005). In *McEvoy*, a juvenile pled guilty to arson of real property and malicious destruction of personal property for setting fire to a high school. The trial court ordered the juvenile and his supervising parents to pay restitution but limited the parents' liability to their insurance proceeds. The juvenile's parents appealed the order, arguing that the Parental Liability Act, MCL 600.2913, when read along with MCL 712A.30, limits a parent's liability to \$2,500.00 in civil court actions. The Court of Appeals rejected the parents' argument, indicating that the Juvenile Code previously contained limits on a parent's liability, and the Legislature removed those limits. *McEvoy*, *supra* at 66. Furthermore, MCL 712A.30(9) provides that the amount of restitution paid to a victim must be set off against any compensatory damages recovered in a civil proceeding, clearly recognizing that restitution is independent of any damages sought in a civil proceeding. *McEvoy*, *supra* at 67.

In *McEvoy*, the parents also argued that because MCL 712A.30(15) allows the court to impose unlimited restitution without a showing of fault on the part of the supervisory parent, it unconstitutionally deprives the parents of substantive due process. Applying a "rational basis" standard of review, the Court of Appeals disagreed. *McEvoy*, *supra* at 68. The Court first noted that although the Juvenile Code does not contain a limit on the amount a parent may be ordered to pay, it does limit imposition of liability to a parent having supervisory responsibility of the juvenile at the time of the criminal acts. In addition, a court must consider a parent's ability to pay and may cancel all or part of the parent's obligation if payment will impose a manifest hardship. *Id.* at 69–70. Thus, parental liability may not be imposed solely based on a familial relationship.

"The Legislature has clearly sought to link *liability* with *responsibility* in a reasonable, but purposeful manner, rather than burdening society generally or the victim, in particular, for the costs of a juvenile's illegal acts. The statute reasonably imposes

liability on the parent responsible for supervising the child.” *Id.* at 70.

The Court concluded that the provisions for restitution by a supervisory parent bear a reasonable relationship to a permissible legislative objective; therefore, there is no violation of the parents’ due process rights.

The parents also argued “that MCL 712A.30 is an unconstitutional bill of attainder because it punishes parents for their status, not their conduct.” *McEvoy, supra* at 72. A bill of attainder is a “legislative act that determines guilt and inflicts punishment upon an identifiable group of individuals without the protections of a judicial trial.” *Id.* In order to determine whether the statute acts as a bill of attainder, the court must determine if the statute “inflicts forbidden punishment.” The Court of Appeals determined that the restitution provisions of MCL 712A.30 “do not fall within the historical meaning of legislative punishment and are not validly characterized as punishment in the constitutional sense.” *McEvoy, supra* at 73. The restitution provisions were designed to serve a nonpunitive purpose: to enable victims to be fairly compensated for losses. The Court also noted that MCL 712A.30(16) and (17) are specific provisions to mitigate any undue financial burden imposed upon parents. The Court concluded that given the nonpunitive nature of the sanctions and the statute’s purpose and effect, it does not act as a bill of attainder. *McEvoy, supra* at 73–74.

CHAPTER 6

Elements of Selected Criminal Traffic Offenses

6.9 Section 625(1) and (8) Offenses—OWI

D. Issues

On page 101, change the subsection lettering from “C” to “D.” On page 103, immediately before Section 6.10, insert the following text:

*Tetrahydrocannabinol.

Carboxy THC,* a metabolite of THC (the psychoactive ingredient of marijuana), is not a schedule 1 controlled substance; however, the presence of carboxy THC in a person’s blood is conclusive evidence of THC’s presence in that person’s body. Because marijuana is a schedule 1 controlled substance (MCL 333.7212(1)(c)) and because the presence of carboxy THC proves the presence of THC in a person’s body, the presence of carboxy THC in a person’s blood may establish that the individual violated MCL 257.625(8). *People v Derror (On Reconsideration)*, ___ Mich App ___, ___ (2005).

In determining whether the trial court properly concluded that carboxy THC is not a schedule 1 controlled substance, the *Derror* Court first looked at the plain language of the relevant statutes. The Court noted that carboxy THC was not a “synthetic equivalent” of THC and that it clearly was “not a part of the actual plant” for purposes of the definition of marijuana found in MCL 333.7212(1)(d). The Court held that the trial court correctly found that carboxy THC was not a schedule 1 drug and further explained this conclusion in light of the standard rules of statutory construction:

“We note that the Legislature could have included metabolites in the definition of marijuana or schedule 1 controlled substances if it so intended. Under the probate code, for example, certain parties are required to report if ‘a newborn infant has any amount of alcohol, a controlled substance, or a metabolite of a controlled substance in his or her body.’ ‘[T]he Legislature is presumed to be aware of all existing statutes when enacting new laws.’ As the Legislature expressly included metabolites in another statute, we must assume that it intended to expressly *exclude* the regulation of these substances in the public health code.” *Derror, supra* at ___ (footnotes omitted).

Although carboxy THC is not a schedule 1 drug and could not, alone, satisfy the requirement in MCL 257.625(8) that a person operated a vehicle with the presence of any amount of a controlled substance in his or her body, “the presence of carboxy THC in a person’s blood *conclusively* establishes the prior ingestion of THC.” *Derror, supra* at ___.

Update: Michigan Circuit Court Benchbook

CHAPTER 2

Evidence

Part III—Witnesses, Opinions, and Expert Testimony (MRE Articles VI and VII)

2.31 Self-Incrimination

B. Assertion of Privilege

After the first quote on page 83, insert the following text:

A witness may invoke his or her Fifth Amendment privilege where the danger of self-incrimination is “real and probable” not “imaginary and unsubstantial.” *Davis v Straub*, ___ F3d ___, ___ (CA 6, 2005), quoting *Brown v Walker*, 161 US 591, 608 (1896). In *Davis*, a murder witness provided one *Mirandized* and one non-*Mirandized* statement to police, both of which tended to exonerate the defendant. When the defense attorney called the witness to testify at trial, the prosecutor asked the court to inform the witness of his privilege against self-incrimination because he was still a suspect. The trial court appointed an attorney for the witness, and after consulting with the attorney, the witness chose not to testify. After concluding that the witness could incriminate himself by admitting to his presence at the scene of the murder, the trial court allowed the witness to assert a blanket Fifth Amendment privilege and refuse to answer any questions.

The United States Court of Appeals for the Sixth Circuit held that the trial court erred in deciding that “[the witness] could avoid any questions because he had a reasonable basis to fear self-incrimination, and invoke a blanket assertion of the Fifth Amendment.” In light of the fact that the witness had provided a *Mirandized* statement that could be used against him if he was charged with a crime, the *Davis* Court concluded that if required to testify to

his presence at the murder scene, the witness could not incriminate himself more than he had already done; therefore, the witness did not have a “real and probable” apprehension of further incriminating himself.

Finally, the Court noted the importance of balancing a defendant’s Sixth Amendment rights with a witness’s privilege against self-incrimination:

“[U]nlike cases where the individual invoking the privilege is also the defendant, in the instant case the Sixth Amendment creates a countervailing right in [the defendant] that requires the court to compel [the witness] to respond to questions that raise only ‘imaginary and unsubstantial risk’ of further incrimination. Questions regarding [the witness]’s presence at the scene fall into this category, and it was a violation of [the defendant]’s Sixth Amendment rights not to compel [the witness] to respond to them.”

CHAPTER 4

Criminal Proceedings

Part II—Pretrial Motions and Proceedings (MCR Subchapters 6.000 and 6.100)

4.21 Search and Seizure Issues

G. Is Exclusion the Remedy if a Violation Is Found?

1. Good-Faith Exception

Insert the following case summary after the June 2005 update to page 348:

In determining whether the good-faith exception applies to a search conducted pursuant to an invalid search warrant, *United States v Laughton** does not establish a blanket prohibition against a reviewing court's consideration of evidence not included in the four corners of the affidavit on which the warrant was based. *United States v Frazier*, ___ F3d ___ (CA 6, 2005). According to *Frazier*, information known to a police officer *and* provided to the issuing magistrate—even if it was not included in the four corners of the affidavit in support of the warrant—may be considered in determining whether an objectively reasonable officer was justified in relying on the warrant.

The Sixth Circuit concluded that the facts in *Frazier* were distinguishable from the facts in *Laughton* because “[*Laughton*] gives no indication that the officer who applied for the search warrant provided the issuing magistrate with the information omitted from the affidavit.” *Frazier, supra* at ___. For purposes of determining whether the good-faith exception should apply to an unlawful search, *Laughton* prohibits the consideration of information not found within the four corners of the affidavit when there is no evidence that the information was provided to the magistrate who issued the warrant. According to *Frazier*, information known to an officer but not found in the supporting affidavit may be considered if the information was revealed to the issuing magistrate.

*409 F3d 744
(CA 6, 2005).

Update: Traffic Benchbook— Third Edition, Volume 1

CHAPTER 2

Civil Infractions

Add the following new sections to Chapter 2, beginning on page 94:

2.23 Failing to Assure Title Transfer When Vehicle Is Sold

A. Statute

A person, other than a licensed dealer, who sells a vehicle remains liable for damages or violations of law resulting from the use or ownership of that vehicle unless the person has complied with the requirements of MCL 257.240.*

MCL 257.240 states, in part:

“(1) The owner of a motor vehicle who has made a bona fide sale by transfer of his or her title or interest and who has delivered possession of the vehicle and the certificate of title to that vehicle properly endorsed to the purchaser or transferee is not liable for any damages or a violation of law that subsequently results from the use or ownership of the vehicle by another, if the owner, other than a licensed dealer, satisfies the conditions prescribed under subsection (2).

“(2) The owner of a motor vehicle, other than a licensed dealer, shall satisfy 1 of the following conditions:

“(a) Accompany the purchaser of the vehicle to a secretary of state branch office to assure that the title of the vehicle being sold is transferred.

“(b) Maintain a record of the sale for not less than 18 months. As used in this subdivision, ‘record of the sale’ means either a photocopy of the reassigned title or a form or document that includes the name, address, driver license

*Effective
October 1,
2005, 2004 PA
493.

number, and signature of the person to whom the vehicle is sold and the purchase price and date of sale of the vehicle.”

B. Civil Sanctions for Failing To Assure Title Transfer When Vehicle Is Sold

“A person who violates [MCL 257.240](2) is responsible for a civil infraction and shall be ordered to pay a civil fine of \$15.00.” MCL 257.240(3). The general rules for assessing costs apply to violations of MCL 257.240(2). See Section 1.20 of this volume for a discussion of the general rules governing the assessment of costs. In addition to the civil fine and costs, a person who is responsible for violating MCL 257.240(2) must pay a justice system assessment of \$40.00. MCL 257.907(4) and (14).

C. Licensing Sanctions for Failing To Assure Title Transfer When Vehicle Is Sold

No points. MCL 257.320a. The finding of responsibility is not reported to the Secretary of State. MCL 257.732(16)(b).

D. Issues

A person who fails to satisfy either condition in MCL 257.240(2) “is presumed to be the last titled owner and to be liable for towing fees and daily storage fees for an abandoned motor vehicle.” MCL 257.240(4).

2.24 Abandoning a Vehicle and Failing to Redeem It Before Disposition

A. Statute

The vehicle code prohibits vehicle abandonment and penalizes a person who abandons a vehicle *and* fails to redeem the vehicle before it is disposed of according to MCL 257.252g. MCL 257.252a(1).*

MCL 257.252a states, in part:

“(1) A person shall not abandon a vehicle in this state. It is presumed that the last titled owner of the vehicle is responsible for abandoning the vehicle unless the person provides a record of sale as that term is defined in [MCL 257.]240. A person who violates this subsection and who fails to redeem the vehicle before disposition of the vehicle under section 252g is responsible for a civil infraction and shall be ordered to pay a civil fine of \$50.00.”

For purposes of MCL 257.252a, an abandoned vehicle is

*Effective October 1, 2005, 2004 PA 495.

- ◆ a vehicle that has remained on private property without the property owner's consent;
- ◆ a vehicle that has remained on public property for not less than 48 hours;
- ◆ a vehicle that has remained on a state trunk line highway for not less than 18 hours if a valid registration plate is affixed to the vehicle; or
- ◆ a vehicle that has remained on a state trunk line highway if there is not a valid registration plate affixed to the vehicle.

MCL 257.252a(2).

The manner in which a vehicle's status is determined and the steps required to provide notice to the last titled owner of the vehicle are outlined in MCL 257.252a(3)–(5). The procedures by which an individual may contest the conclusion that the vehicle is abandoned, challenge the reasonableness of towing and storage fees, or redeem the vehicle before disposition are described in MCL 257.252a(6) and (7).

B. Civil Sanctions for Abandoning a Vehicle and Failing to Redeem It Before Disposition

A person who abandons a vehicle and fails to redeem it before disposition as provided by MCL 257.252g is responsible for a civil infraction and shall pay a fine of \$50.00 and a justice system assessment of \$40.00. MCL 257.252a(1); MCL 257.907(14). The general rules for assessing costs apply to violations of MCL 257.252a(1). See Section 1.20 of this volume for a discussion of the general rules governing the assessment of costs.

C. Licensing Sanctions for Abandoning a Vehicle and Failing to Redeem It Before Disposition

No points. MCL 257.320a. The finding of responsibility is not reported to the Secretary of State. MCL 257.732(16)(b).

Update: Traffic Benchbook— Third Edition, Volume 3

CHAPTER 3

Section 625 Offenses

3.4 OWI or OWVI Causing Death of Another — §625(4)

B. Elements

4. The defendant's operation of the motor vehicle caused the death of another person.

On page 131, change the sub-subsection heading as indicated above and replace the first paragraph and the **Note** following it with the following text:

The causation element of MCL 257.625(4) requires only that a defendant's operation of a motor vehicle—not a defendant's operation of a vehicle as affected by the defendant's state of intoxication—be a factual and proximate cause of the harm resulting from the statutory violation. *People v Schaefer*, 473 Mich 418, 446 (2005). In the consolidated cases decided in *Schaefer*, the Michigan Supreme Court overruled *People v Lardie*, 452 Mich 231 (1996), to the extent that *Lardie* concluded the statute required that a defendant's driving as affected by his or her intoxication be a substantial cause of the victim's death.* *Schaefer, supra* at 422, 433–34, 446.

The *Schaefer* Court explained:

“The plain text of §625(4) does not require that the prosecution prove the defendant's intoxicated state affected his or her operation of the motor vehicle. Indeed, §625(4) requires no causal link at all between the defendant's intoxication and the victim's death. . . .

“Quite simply, by enacting §625(4), the Legislature intended to punish ‘operating while intoxicated,’ not ‘operating in an intoxicated manner.’” *Schaefer, supra* at 422.

*Other *Lardie* holdings were not disturbed by *Schaefer*. *Schaefer, supra* at 422 n 4.

The *Schaefer* Court explained that the causation element of §625(4) must be construed “according to the actual text of the statute[:.]”

“Section 625(4) plainly requires that the victim’s death be caused by the defendant’s *operation* of the vehicle, not the defendant’s *intoxicated* operation. Thus, the manner in which the defendant’s intoxication affected his or her operation of the vehicle is unrelated to the causation element of the crime. The defendant’s status as ‘intoxicated’ is a separate element of the offense used to identify the class of persons subject to liability under §625(4).” *Schaefer*, *supra* at 433.

A prosecuting attorney must prove that a defendant’s operation of a motor vehicle was a factual cause of a victim’s death: that “but for” the defendant’s operation of the vehicle, the victim’s death would not have occurred. A prosecuting attorney must also prove that the defendant’s operation of the vehicle was a proximate cause of the victim’s death: that the victim’s death was a direct and natural result of the defendant’s operation of the vehicle. It must also be determined that no intervening cause severed the causal link between the defendant’s operation of the vehicle and the victim’s death. An intervening cause is sufficient to sever that causal link if it was not reasonably foreseeable. An act of God or a victim’s or third party’s gross negligence or intentional conduct is generally unforeseeable and thus a sufficient intervening cause; ordinary negligence is foreseeable and thus not a sufficient intervening cause. *Id.* at 435–39.

CHAPTER 3

Section 625 Offenses

3.5 OWI or OWVI Causing Serious Impairment of a Body Function — §625(5)

B. Elements

4. The defendant's operation of the motor vehicle caused another person to suffer serious impairment of a body function.

On page 137, change the sub-subsection heading as indicated above and replace the first paragraph and the **Note** following it with the following text:

The causation element of MCL 257.625(4) requires only that a defendant's operation of a motor vehicle—not a defendant's operation of a vehicle as affected by the defendant's state of intoxication—be a factual and proximate cause of the harm resulting from the statutory violation. *People v Schaefer*, 473 Mich 418, 446 (2005). In the consolidated cases decided in *Schaefer*, the Michigan Supreme Court overruled *People v Lardie*, 452 Mich 231 (1996), to the extent that *Lardie* concluded the statute required that a defendant's driving as affected by his or her intoxication be a substantial cause of the victim's death.* *Schaefer*, *supra* at 422, 433–34, 446.

*Other *Lardie* holdings were not disturbed by *Schaefer*. *Schaefer*, *supra* at 422 n 4.

The *Schaefer* Court explained:

“The plain text of §625(4) does not require that the prosecution prove the defendant's intoxicated state affected his or her operation of the motor vehicle. Indeed, §625(4) requires no causal link at all between the defendant's intoxication and the victim's death. . . .

“Quite simply, by enacting §625(4), the Legislature intended to punish ‘operating while intoxicated,’ not ‘operating in an intoxicated manner.’” *Schaefer*, *supra* at 422.

The *Schaefer* Court explained that the causation element of §625(4) must be construed “according to the actual text of the statute[:.]”

“Section 625(4) plainly requires that the victim's death be caused by the defendant's *operation* of the vehicle, not the defendant's *intoxicated* operation. Thus, the manner in which the defendant's intoxication affected his or her operation of the vehicle is unrelated to the causation element of the crime. The defendant's status as ‘intoxicated’ is a separate element of the offense used to identify the class of persons subject to liability under §625(4).” *Schaefer*, *supra* at 433.

A prosecuting attorney must prove that a defendant's operation of a motor vehicle was a factual cause of a victim's death: that "but for" the defendant's operation of the vehicle, the victim's death would not have occurred. A prosecuting attorney must also prove that the defendant's operation of the vehicle was a proximate cause of the victim's death: that the victim's death was a direct and natural result of the defendant's operation of the vehicle. It must also be determined that no intervening cause severed the causal link between the defendant's operation of the vehicle and the victim's death. An intervening cause is sufficient to sever that causal link if it was not reasonably foreseeable. An act of God or a victim's or third party's gross negligence or intentional conduct is generally unforeseeable and thus a sufficient intervening cause; ordinary negligence is foreseeable and thus not a sufficient intervening cause. *Id.* at 435–39.

CHAPTER 3

Section 625 Offenses

3.8 Operating With the Presence of Drugs — §625(8)

B. Elements

2. At the time the defendant operated the vehicle, “any amount of a controlled substance” was present in the defendant’s body.

Insert the following text after the paragraph at the top of page 148:

Carboxy THC,* a metabolite of THC (the psychoactive ingredient of marijuana), is not a schedule 1 controlled substance; however, the presence of carboxy THC in a person’s blood is conclusive evidence of THC’s presence in that person’s body. Because marijuana is a schedule 1 controlled substance (MCL 333.7212(1)(c)) and because the presence of carboxy THC proves the presence of THC in a person’s body, the presence of carboxy THC in a person’s blood may establish that the individual violated MCL 257.625(8). *People v Derror (On Reconsideration)*, ___ Mich App ___, ___ (2005).

*Tetrahydro-cannabinol.

In determining whether the trial court properly concluded that carboxy THC is not a schedule 1 controlled substance, the *Derror* Court first looked at the plain language of the relevant statutes. The Court noted that carboxy THC was not a “synthetic equivalent” of THC and that it clearly was “not a part of the actual plant” for purposes of the definition of marijuana found in MCL 333.7212(1)(d). The Court held that the trial court correctly found that carboxy THC was not a schedule 1 drug and further explained this conclusion in light of the standard rules of statutory construction:

“We note that the Legislature could have included metabolites in the definition of marijuana or schedule 1 controlled substances if it so intended. Under the probate code, for example, certain parties are required to report if ‘a newborn infant has any amount of alcohol, a controlled substance, or a metabolite of a controlled substance in his or her body.’ ‘[T]he Legislature is presumed to be aware of all existing statutes when enacting new laws.’ As the Legislature expressly included metabolites in another statute, we must assume that it intended to expressly *exclude* the regulation of these substances in the public health code.” *Derror, supra* at ___ (footnotes omitted).

Although carboxy THC is not a schedule 1 drug and could not, alone, satisfy the requirement in MCL 257.625(8) that a person operated a vehicle with the presence of any amount of a controlled substance in his or her body, “the presence of carboxy THC in a person’s blood *conclusively* establishes the prior ingestion of THC.” *Derror, supra* at ___.

CHAPTER 4

Section 904 Offenses

4.2 Driving While License Suspended or Revoked Causing Death—§904(4)

A. Elements of the Offense

3. By operation of the motor vehicle, the defendant caused the death of another person.

On page 160, replace the text in this sub-subsection with the following:

Based on the outcome in *People v Schaefer*, 473 Mich 418, 446 (2005), the Michigan Supreme Court reversed the Court of Appeals' decision in *People v Schut* (*Schut I*), 265 Mich App 446 (2005), because *Schaefer* overruled the part of *People v Lardie** on which the Court of Appeals relied in deciding *Schut*. *People v Schut* (*Schut II*), ___ Mich ___ (2005). In *Schut II*, the Court remanded the case to the District Court for reconsideration in light of *Schaefer*.

The *Schaefer* Court determined that the causation element of MCL 257.625(4) requires only that a defendant's operation of a motor vehicle—not a defendant's operation of a vehicle as affected by the defendant's state of intoxication—be a factual and proximate cause of the harm resulting from the statutory violation. *Schaefer, supra* at 446. The *Schaefer* Court explained that the causation element of §625(4) must be construed “according to the actual text of the statute[:.]”

“Section 625(4) plainly requires that the victim's death be caused by the defendant's *operation* of the vehicle, not the defendant's *intoxicated* operation. Thus, the manner in which the defendant's intoxication affected his or her operation of the vehicle is unrelated to the causation element of the crime. The defendant's status as ‘intoxicated’ is a separate element of the offense used to identify the class of persons subject to liability under §625(4).” *Schaefer, supra* at 433.

*452 Mich 231 (1996). *Schaefer* overruled *Lardie* to the extent that *Lardie* ruled that a defendant's driving—as affected by the defendant's intoxication—must be a substantial cause of the harm resulting from the statutory violation. *Schaefer, supra* at 422 n 4.

This reasoning as applied to the facts in *People v Large* (a companion case decided in *Schaefer*) necessitated the Court's reversal in *Schut I*. The facts in *Schut* are similar to the facts in *Large*. In *Large*, the victim rode down a partially obstructed hill onto a busy road on a bicycle without brakes. In *Schut*, the victim drove a snowmobile into the path of the defendant's truck. Under *Schaefer*'s rule, whether a defendant is liable for the harm caused by a collision that occurs during the defendant's operation of a motor vehicle while intoxicated (*Large*), or when the defendant's license has been suspended or revoked (*Schut*), requires an analysis of both factual and proximate cause.* *Schaefer, supra* at 435–39.

*See this month's update to Volume 3, Section 3.4, above.